No. 14-1470

Title:	William Robert Bernard, Jr., Petitioner
	v.
	Minnesota
Docketed:	June 16, 2015
Lower Ct:	Supreme Court of Minnesota
Case Nos.:	(A13-1245)
Decision Date:	February 11, 2015
Rehearing Denied:	March 16, 2015

Questions Presented

---Date---	-------Proceedings and Orders----------
Jun 15 2015	Petition for a writ of certiorari filed. (Response due July 16, 2015)
Jul 16 2015	Brief of respondent Minnesota in opposition filed.
Aug 5 2015	DISTRIBUTED for Conference of September 28, 2015.
Aug 5 2015	Reply of petitioner William Robert Bernard, Jr. filed. (Distributed)
Aug 25 2015	Rescheduled.
Nov 17 2015	DISTRIBUTED for Conference of December 4, 2015.
Nov 30 2015	Supplemental brief of petitioner William Robert Bernard, Jr. filed. (Distributed)
Dec 7 2015	DISTRIBUTED for Conference of December 11, 2015.
Dec 11 2015	Petition GRANTED The petitions for writs of certiorari in No. 14-1468 and No. 14-1507 are granted. The cases are consolidated and a total of one hour is allotted for oral argument.
Jan 26 2016	The time to file the joint appendix and petitioners' briefs on the merits is extended to and including February 4, 2016. VIDED
Jan 26 2016	The time to file respondents' briefs on the merits is extended to and including March 15, 2016. VIDED
Feb 4 2016	Brief of petitioner William Robert Bernard, Jr. filed.
Feb 4 2016	Motion to dispense with printing the joint appendix filed by petitioner Danny Birchfield. VIDED.
Feb 8 2016	Motion for leave to file amicus brief filed by Indiana Tech Law School Amicus Project in support of neither party. VIDED.
Feb 9 2016	Brief amici curiae of Minnesota Association of Criminal Defense Lawyers, et al. filed.
Feb 9 2016	Brief amicus curiae of DUI Defense Lawyers Association filed. VIDED.
Feb 11 2016	Brief amici curiae of Downsize DC Foundation, et al. filed. VIDED.
Feb 11 2016	Brief amicus curiae of American Civil Liberties Union filed. VIDED.
Feb 11 2016	Brief amici curiae of The National College for DUI Defense, and The National Association of Criminal Defense Lawyers filed. VIDED.
Feb 29 2016	Motion to dispense with printing the joint appendix filed by petitioner GRANTED. VIDED
Feb 29 2016	Motion for leave to file amicus brief filed by Indiana Tech Law School Amicus Project in

	support of neither party GRANTED. VIDED
Mar 4 2016	SET FOR ARGUMENT ON Wednesday, April 20, 2016. VIDED
Mar 14 2016	Record requested from the Supreme Court of Minnesota.
Mar 15 2016	DISTRIBUTED.
Mar 15 2016	Brief of respondent Minnesota filed. (Distributed)
Mar 16 2016	Brief amicus curiae of The California District Attorneys Association filed. VIDED. (Distributed)
Mar 22 2016	Brief amicus curiae of United States filed. VIDED. (Distributed)
Mar 22 2016	Brief amici curiae of New Jersey and Seventeen Other States filed. VIDED. (Distributed)
Mar 22 2016	Brief amici curiae of The Council of State Governments, et al. filed. VIDED. (Distributed)
Mar 22 2016	Motion of the Solicitor General for enlargement of time for oral argument, for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Mar 22 2016	Brief amicus curiae of Mothers Against Drunk Driving filed. VIDED. (Distributed)
Mar 22 2016	Brief amici curiae of The National District Attorneys Association, et al. filed. VIDED. (Distributed)
Mar 23 2016	Record received from the Supreme Court of Minnesota is electronic.
Apr 4 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for enlargement of time for oral argument, and for divided argument GRANTED. and the time is divided as follows: 35 minutes for petitioners, 15 minutes for respondent North Dakota, 10 minutes for respondent Minnesota, and 10 minutes for the Solicitor General. VIDED.
Apr 13 2016	Reply of petitioner William Robert Bernard, Jr. filed. (Distributed.)
Apr 20 2016	Argued. For petitioners: Charles A. Rothfeld, Washington, D. C. For respondents in Nos. 14-1468 & 14-1507: Thomas R. McCarthy, Arlington, Va. For respondent in 14-1470: Kathryn Keena, Assistant Dakota County Attorney, Hastings, Minn. For United States as amicus curiae in support of respondents: Ian H. Gershengorn, Deputy Solicitor General, Department of Justice, Washington, D. C. VIDED.
Jun 23 2016	Judgment in No. 14-1468 REVERSED and case REMANDED. Judgment in No. 14-1470 AFFIRMED. Judgment in No. 14-1507 VACATED AND REMANDED. Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Breyer, and Kagan, JJ., joined. Sotomayor, J., filed an opinion concurring in part and dissenting in part, in which Ginsburg, J., joined. Thomas, J., filed an opinion concurring in the judgment in part and dissenting in part.
Jul 25 2016	JUDGMENT ISSUED
Jul 25 2016	MANDATE ISSUED

Supreme Court, U.S.
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14-1470
No.

In the Supreme Court of the United States

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Minnesota

PETITION FOR A WRIT OF CERTIORARI

JEFFREY S. SHERIDAN
Sheridan & Dulas, P.A.
320 Eagandale Center
1380 Corporate Center Curve
Eagan, MN 55121
(651) 686-7870

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

QUESTION PRESENTED

Minnesota law makes it a criminal offense for a person who has been arrested for driving while impaired to refuse to submit to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol. Although the State acknowledges that such tests do not serve the purposes of officer safety or evidence preservation, a divided Minnesota Supreme Court held that a person may be compelled to submit to a warrantless breath test as a "search incident to arrest." From that starting point, the court held that the State may make refusal to submit to such a test a criminal offense. The question presented is:

Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

TABLE OF CONTENTS

Page

Question Presented i
Table of Authorities iv
Opinions Below 1
Jurisdiction 1
Constitutional and Statutory Provisions Involved 1
Statement 2
A. Factual and legal background. 4
B. The decisions below. 5
Reasons for Granting the Petition 10
A. Because a breath test is not administered to further officer safety or preserve evidence, it is not a valid search incident to arrest 10
1. The search-incident-to-arrest exception does not per se apply to all searches of the person. 11
2. Because the proposed underlying search would be unconstitutional, Minnesota's test-refusal statute—which criminalizes refusal to submit to an unconstitutional search—also is unconstitutional 19
3. Minnesota's statute may not be upheld on the alternative ground that implied-consent statutes are per se reasonable or establish actual consent. 20

TABLE OF CONTENTS—continued

Page

B. State and federal courts are split over whether chemical alcohol tests constitute reasonable searches incident to arrest. 26

C. The question presented is one of substantial and recurring importance. 29

Conclusion 32

Appendix A – Minnesota Supreme Court opinion (February 11, 2015) 1a

Appendix B – Court of appeals opinion (March 17, 2014) 35a

Appendix C – District court order (June 28, 2013) 47a

Appendix D – Order denying rehearing (March 16, 2015) 62a

TABLE OF AUTHORITIES

Page(s)

CASES

Amelkin v. *McClure*,
330 F.3d 822 (6th Cir. 2003) 24

Arizona v. *Gant*,
556 U.S. 332 (2009) 11, 12, 13, 14

Aviles v. *State*,
385 S.W.3d 110 (Tex. App. 2012) 22

Boyd v. *United States*,
116 U.S. 616 (1886) 20

Bumper v. *North Carolina*,
391 U.S. 543 (1968) 26

Burnett v. *Municipality of Anchorage*,
806 F.2d 1447 (9th Cir. 1986) 27

Byars v. *State*,
336 P.3d 939 (Nev. 2014) 23

Byrd v. *Clark*,
783 F.2d 1002 (11th Cir. 1986) 27

California v. *Trombetta*,
467 U.S. 479 (1984) 16

Camara v. *Municipal Court of San Francisco*,
387 U.S. 523 (1967) 9, 19, 20, 24

Chimel v. *California*,
395 U.S. 752 (1969) ..... *passim*

Commonwealth Dep't of Transp. v. *McFarren*,
525 A.2d 1185 (Pa. 1987) 27

TABLE OF AUTHORITIES—continued

Page(s)

Dodd v. *Jones*,
623 F.3d 563 (8th Cir. 2010) 27

Flonnory v. *State*,
2015 WL 374879 (Del. 2015) 23

Frank v. *Maryland*,
359 U.S. 360 (1959) 20

Frost & Frost Trucking Co. v. *Railroad Comm'n*,
271 U.S. 583 (1926) 25

Katz v. *United States*,
389 U.S. 347 (1967) 11, 13

Koontz v. *St. Johns River Water Mgmt. Dist.*,
133 S. Ct. 2586 (2013) 24

Lebron v. *Sec'y, Florida Dep't of Children & Families*,
710 F.3d 1202 (11th Cir. 2013) 25

Maryland v. *King*,
133 S. Ct. 1958 (2013) 10, 14, 22

Michigan Dept. of State Police v. *Sitz*,
496 U.S. 444 (1990) 31

Missouri v. *McNeely*,
133 S. Ct. 1552 (2013) ..... *passim*

Nolin v. *Isbell*,
207 F.3d 1253 (11th Cir. 2000) 27

Reeder v. *State*,
428 S.W.3d 924 (Tex. App. 2014) 23

TABLE OF AUTHORITIES—continued

Page(s)

Riley v. *California*,
134 S. Ct. 2473 (2014) ..... *passim*

Schmerber v. *California*,
384 U.S. 757 (1966) 10, 14, 28

Skinner v. *Ry. Labor Execs.' Ass'n.*,
489 U.S. 602 (1989) 16, 17, 18, 21

South Dakota v. *Neville*,
459 U.S. 553 (1983) 25, 26

State v. *Arrotta*,
339 P.3d 1177 (Idaho 2014) 23

State v. *Baker*,
502 A.2d 489 (Me. 1985) 27

State v. *Birchfield*,
858 N.W.2d 302 (N.D. 2015) 21, 26, 29

State v. Brooks,
838 N.W.2d 563 (Minn. 2013) 26

State v. *Butler*,
302 P.3d 609 (Ariz. 2013) 23

State v. *Declerck*,
317 P.3d 794 (Kan. Ct. App. 2014) 23

State v. *Fierro*,
853 N.W.2d 235 (S.D. 2014) 23

State v. *Halseth*,
339 P.3d 368 (Idaho 2014) 23

State v. *Hill*,
2009 WL 1485026 (Ohio Ct. App. 2009) 27

TABLE OF AUTHORITIES—continued

Page(s)

State v. Janosky,
2000 WL 1449367 (Tenn. Crim. App. 2000).....23

State v. *Johnson*,
2014 WL 2565771 (Minn. Ct. App. 2014).....26

State v. *McClure*,
335 P.3d 1260 (Or. 2014) (en banc) 27

State v. *McNeely*,
358 S.W.3d 65 (Mo. 2012) 28

State v. *Seibel*,
471 N.W.2d 226 (Wis. 1991) 27

State v. *Stern*,
846 A.2d 64 (N.H. 2004).....28

State v. *Villarreal*,
2014 WL 6734178 (Tex. Crim. App. 2014) 28

State v. *Washburn*,
2015 WL 630868 (N.D. 2015).....21

State v. *Welch*,
342 S.E.2d 789 (N.C. 1986).....28

State v. *Wells*,
2014 WL 4977356 (Tenn. Crim. App. 2014).....22

State v. *Wong*,
486 A.2d 262 (N.H. 1984).....28

State v. *Wulff*,
337 P.3d 575 (Idaho 2014) 23

State v. *Yong Shik Won*,
332 P.3d 661 (Haw. Ct. App. 2014) 23

TABLE OF AUTHORITIES—continued

Page(s)

Tennessee v. *Garner*,
471 U.S. 1 (1985) 17

Terry v. *Ohio*,
392 U.S. 1 (1968) 13

United States v. *Berry*,
866 F.2d 887 (6th Cir. 1989) 27

United States v. *Brown*,
2013 WL 5604589 (D. Md. 2013) 23

United States v. *Drayton*,
536 U.S. 194 (2002) 15

United States v. *Reid*,
929 F.2d 990 (4th Cir. 1991) 27

United States v. *Robinson*,
414 U.S. 218 (1973) ..... *passim*

Williams v. *State*,
2015 WL 3511222 (Fla. Dist. Ct. App. 2015) 21, 23, 24, 28

Wing v. *State*,
268 P.3d 1105 (Alaska Ct. App. 2012) 27

Wyoming v. *Houghton*,
526 U.S. 295 (1999) 14

STATUTES

Ala. Code § 32-5-192 17

Alaska Stat. § 28.35.032 ..... 17, 30

Alaska Stat. § 28.35.035(a) 17

TABLE OF AUTHORITIES—continued

Page(s)

Ariz. Rev. Stat. § 28-1321(D)(1) 17
Ark. Code § 5-65-205(a)(1) 17
Ark. Code § 5-65-208(a)(1) 17
Conn. Gen. Stat. § 14-227b(b) 17
Conn. Gen. Stat. § 14-227c(b) 17
Fla. Stat. 316.1932 30
Ga. Code § 40-5-67.1(d) 17
Haw. Rev. Stat. § 291e-68 30
Haw. Rev. Stat. § 291e-15 17
Indiana Code § 9-30-7-1) 30
Iowa Code § 321J.6(1) 17
Iowa Code § 321J.9(1) 17
Kan. Stat. § 8-1025 30
Ky. Rev. Stat. § 189A.105(2)(b) 17
La. Rev. Stat. § 32.666(A) 17
Louisiana Rev. Stat. § 661(C)(1)(f) 30
Mass. Gen. Laws, ch. 90, § 24(1) 17
Md. Transp. Code § 16-205.1(b)(i)(1) 17
Md. Transp. Code § 16-205.1(c)(1) 17
Mich. Comp. Laws § 257.625d(1) 18
Minn. Stat. § 169A.20 ..... 1, 2, 4, 5 30
Minn. Stat. § 169A.24 ..... 4, 5

TABLE OF AUTHORITIES—continued

Page(s)

Minn. Stat. § 169A.51(1) 2, 4
Miss. Code § 63-11-21 18
Mont. Code § 61-8-402 18
North Dakota C.C. § 39-08-01(1)(e) 30
N.H. Rev. Stat. § 265-A:14(I) 18
N.M. Stat. § 66-8-111(A) 18
N.Y. Veh. & Traf. Law § 1194 18
Neb. Rev. Stat. § 60-498.01(2) 18
Neb. Rev. Stat. § 60-6,197 30
Neb. Rev. Stat. § 60-6,211.02 30
Okla. Stat., Tit. 47, § 753 18
Ore. Rev. Stat. § 813.100(2) 18
75 Pa. Cons. Stat. § 1547(b)(1) 18
R.I. Gen. Laws § 31-27-2.1 ..... 18, 30
R.I. Gen. Laws § 31-27-2.9(a) 18
S.C. Code § 56–5–2950(B) (2014) 18
Tenn. Code § 55-10-406 30
Tex. Transp. Code § 724.012(b) 18
Tex. Transp. Code § 724.013 18
Va. Code § 18.2-268.3 30
Vt. Stat., Tit. 23, § 1202 18
23 Vermont Stat. § 1201(b) 30

TABLE OF AUTHORITIES—continued

Page(s)

W. Va. Code § 17C-5-4(b) 18

W. Va. Code § 17C-5-7 18

Wash. Rev. Code § 46.20.308(2)–(4) 18

Wyo. Stat. § 31-6-102(d) 18

MISCELLANEOUS

Dram Shop Civil Liability and Criminal Penalty Statutes, Nat'l Conference of State Legislators (June 14, 2013) 32

David Eden et al., *Datamaster DMT Breath Test Operator Training Course Manual*, Minn. Dep't of Pub. Safety, 51 (Nov. 5, 2013) 16

Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 67 (1988) 24

Nat'l Highway Traffic Safety Admin., Dep't of Transp., Traffic Safety Facts, Breath Test Refusals and Their Effect on DWI Prosecutions, DOT HS 811 551 (2012) 30

Nat'l Highway Traffic Safety Admin., Digest of Impaired Driving and Selected Beverage Control Laws (2013) 32

TABLE OF AUTHORITIES—continued

Page(s)

Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989)); see also Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4 (1988) 24

U.S. Census Bureau, Commuting in the United States: 2009 25

Robert B. Voras et al., *Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, 40 J. Safety Res. 77 (2009) 32

PETITION FOR A WRIT OF CERTIORARI

Petitioner William Robert Bernard, Jr. respectfully petitions for a writ of certiorari to review the judgment of the Minnesota Supreme Court in this case.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court (App., *infra*, 1a-34a) is reported at 859 N.W.2d 762 (Minn. 2015). The decision of the Minnesota Court of Appeals (App., *infra*, 35a-46a) is reported at 844 N.W.2d 41 (Minn. App. 2014). The decision of the Minnesota District Court (App., *infra*, 47a-61a) is unreported.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on February 11, 2015. That court denied petitioner's motion for rehearing on March 16, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause * * *.

The Minnesota Statutes, M.S.A. § 169A.20(2), provide in relevant part:

> It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license).

M.S.A. § 169A.51(1) provides in relevant part:

> Any person who drives, operates, or is in physical control of a motor vehicle within this state or on any boundary water of this state consents, subject to the provisions of sections 169A.50 to 169A.53 (implied consent law), and section 169A.20 (driving while impaired), to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance. The test must be administered at the direction of a peace officer.

STATEMENT

Minnesota is one of thirteen States that make it a criminal offense for a person who has been arrested on suspicion of driving while impaired to refuse to submit to a warrantless test administered to determine the presence of alcohol in the person's blood. Under this statute, refusal to submit to a test is a crime that is wholly independent of the substantive offense of driving while impaired; a person may be convicted of test refusal even if he or she is not charged with a driving offense—or, indeed, is acquitted of such a offense.

In this case, a deeply divided Minnesota Supreme Court upheld the constitutionality of this criminal penalty, reasoning that compelled application of a breath test—a procedure that requires the insertion of a tube into the arrestee's mouth to obtain "deep-lung air"—is permissible as a routine search incident to arrest. In reaching this conclusion, the court below recognized that, when a search is directed at the area or items *near* an arrestee, the search is permissible as one incident to arrest only to protect officer safety or prevent the active destruction of evidence. But the court held that these limits do not apply at all when the search is of the *person* of the arrestee, making such personal searches *per se* permissible.

That holding is shockingly wrong: it untethers the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement from the exception's rationale, while giving greater constitutional protection to an arrestee's pockets or handbag than to the arrestee's body. Unsurprisingly, the holding misunderstands recent decisions of this Court and is in tension with the rulings of other state courts of last resort and federal courts of appeals. And it addresses matters of enormous practical importance, upholding a sort of constitutionally dubious compelled-consent criminal statute that is applied many thousands of times every year and confusing the meaning of the search-incident-to-arrest doctrine. In all, as the dissent below explained, the Minnesota Supreme Court's decision "fundamentally departs from longstanding Fourth Amendment principles, and nullifies the warrant requirement in nearly every drunk-driving case." App., *infra*, 22a. Review by this Court is warranted.

A. Factual and legal background.

1. Minnesota law provides that any person "who drives, operates, or is in physical control of a motor vehicle within this state or on any boundary water of this state" is deemed, in specified circumstances, to "consent[] * * * to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance." M.S.A. § 169A.51(1). In specified circumstances—among them, when a person has been validly arrested for driving while impaired—the law also makes it "a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine." M.S.A. § 169A.20(2). Criminal penalties for violation of the test-refusal statute are in many cases more onerous than those for the separate offense of driving while impaired; depending upon the circumstances, conviction of refusing to submit to a chemical test can lead to as many as seven years' imprisonment and a fine of up to $14,000. Minn. Stat. § 169A.24, subd. 2 (2014).

2. As recounted by the court below, this case "arises from a report that police received on August 5, 2012, that three men were attempting to get a boat out of the water at a boat launch in South Saint Paul. When police arrived at the boat launch, a witness told the officers that the men's truck became stuck in the river while they were trying to pull their boat out of the water." App., *infra*, 3a. One of the men, petitioner here, "admitted to police that he had been drinking, but he and the other men denied driving the truck." *Ibid.* When witnesses nevertheless identified petitioner as the truck's driver, the officers

arrested him on suspicion of driving while impaired. *Ibid.*

The officers proceeded to read petitioner the Minnesota Implied Consent Advisory, which informed him "that Minnesota law required him to take a chemical test, that refusal to take the test was a crime, and that he had the right to consult with an attorney so long as there was not an unreasonable delay in the administration of the test." App., *infra*, 3a-4a. At no point did the officers make any attempt to obtain a search warrant to authorize administration of the test. After petitioner declined to take the test, the State charged him with two counts of the crime of First Degree Driving While Impaired—Test Refusal, in violation of Minn. Stat. § 169A.20, subd. 1(1)-(2) (2014). *Id.* at 4a. First-degree test refusal carries a mandatory minimum sentence of three years in prison, with a maximum of seven years' imprisonment and a fine of up to $14,000. Minn. Stat. § 169A.24, subd. 2 (2014); § 169A.276, subd. 1(a) (2014).

B. The decisions below.

1. Petitioner filed a motion to dismiss, arguing that the State's imposition of criminal penalties for refusing to submit to a warrantless breath test violates the Fourth Amendment. App., *infra*, 50a. The state trial court agreed and ordered the prosecution dismissed. *Id.* at 47a-61a. The court started from the proposition that the Minnesota test-refusal statute is meant to impose criminal penalties only for refusal of a *lawful* demand to be tested. In this case, the court continued, a warrantless search is *per se* unreasonable, "subject only to a few specifically established and well delineated exceptions." *Id.* at 54a-55a (citations and internal quotation marks omitted). Those excep-

tions include consent and the existence of exigent circumstances, but here petitioner "refused to consent to provide a sample of his breath" and, under this Court's holding in *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013), something more is required than the "'natural dissipation of alcohol in the blood' to establish an exigency justifying a warrantless search." *Id.* at 55a, 58a. Accordingly, the trial court held, "[b]ecause no warrant was obtained and none of the recognized exceptions to the warrant requirement apply, no lawful basis exists in this case to request submission to a chemical test." *Id.* at 59a. On the State's appeal, however, the Minnesota Court of Appeals reversed, holding that the State could compel petitioner to take a blood alcohol test because the arresting officers had probable cause to search petitioner and *could have* secured a warrant. *Id.* at 35a-46a.

2. The Minnesota Supreme Court in turn repudiated the appellate court's reasoning as "contrary to basic principles of Fourth Amendment law" because "[a] warrantless search is generally unreasonable, unless it falls into one of the recognized exceptions to the warrant requirement." App., *infra*, 7a. But, in a divided ruling, the court below nevertheless held application of the state test-refusal law constitutional, reasoning that "a warrantless breath test of [petitioner] would not have violated the Fourth Amendment because it is a search incident to [petitioner's] valid arrest." *Id.* at 9a.

In reaching this conclusion, the court acknowledged both that "the State in this case cannot show that a search of [petitioner's] breath was related to officer safety or concerns that [petitioner] would destroy evidence," and that this Court "has required ei-

ther a concern for officer safety or a concern over the preservation of evidence to support the constitutionality of a warrantless search of the area where the defendant was arrested or a search of items near the defendant." App., *infra*, 11a, 12a & n.7. But the Minnesota court held that these considerations have no bearing on the permissibility of a search incident to arrest when a warrantless search concerns, not the "area" or "items" near the defendant, but "the *body* of a person validly arrested." *Id.* at 12a (emphasis added).

The court believed that this conclusion follows from what it characterized as this Court's holding in *United States* v. *Robinson*, 414 U.S. 218 (1973), that "a warrantless search of a person was categorically reasonable under the Fourth Amendment as a search incident to that person's valid arrest." App., *infra*, 13a. And the court below opined that this rule was reaffirmed in *Riley* v. *California*, 134 S. Ct. 2473 (2014), which it understood to permit a broader search of "the person of an arrestee" than of the "area where the defendant was arrested" or of "items near the defendant." App, *infra*, 15a, 11a-12a. Accordingly, the Minnesota court held that "a warrantless breath test of [petitioner] would have been constitutional under the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement." *Id.* at 19a. And that conclusion, the court found, disposed of petitioner's appeal because petitioner "does not have a fundamental right to refuse a constitutional search." *Id.* at 20a.

3. Justices Page and Stras issued a joint dissent. Criticizing the majority for "a decision that is as notable for its disregard of Supreme Court precedent as it is for its defective logic," the dissent pointed to

"[t]wo erroneous assumptions [that] permeate the court's analysis." App., *infra*, 23a.

First, the dissent noted that this Court "has never implied, must less stated, that the search-incident-to-arrest exception extends to the forcible removal of substances from within a person's body." App., *infra*, 23a. Any doubt about this, the dissent continued, "vanished after" this Court's decision in *Riley*; "[g]iven *Riley*'s clarification that *Robinson* [which approved a search of a cigarette package in an arrestee's pocket] applies only to physical evidence found on a person's body—and not digital content found on cell phones—the only logical conclusion is that the removal of breath (or blood or urine) from the body to discover an arrestee's blood alcohol level is not part of a search incident to arrest." *Id.* at 25a, 26a. In the dissent's view, "[i]t seems obvious that, similar to the digital content of a cell phone, alveolar 'deep-lung' air 'differ[s] in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *Id.* at 27a (quoting *Riley*, 134 S. Ct. at 2489). The dissent added that "[t]ypically, a person taking a breath test must insert a tube into his or her mouth and then comply with the officer's instructions to blow into the tube at a specified rate until the breathalyzer had had sufficient time to analyze a sample of deep-lung air" (*Id.* at 28a), and the majority "does not cite a single Supreme Court case authorizing such a profound intrusion *into* a person's bodily integrity during a search incident to arrest." *Ibid.*

The dissent also challenged the majority's "equally extreme" holding that "the rationales for the search-incident-to-arrest exception—officer safety and preventing the destruction of evidence—do not

apply to searches of a person." App., *infra*, 29a. In the dissent's view, "neither *Robinson* nor *Riley* rejected [those] rationales as bookends for the circumstances under which the search-incident-to-arrest exception applies." *Id.* at 30a. Indeed, the dissent continued, "[t[he *only* justification for allowing police to conduct a warrantless breath test is the preservation of evidence due to the natural dissipation of alcohol from a person's bloodstream. In *McNeely*, however, the Supreme Court specifically rejected the proposition that the natural metabolization of alcohol constitutes a *per se* exigency justifying a warrantless blood test." *Id.* at 31a. And "[i]t strains credulity to suppose that, after the Supreme Court carefully examined the exigent-circumstances exception in *McNeely*, it would conclude in some future case that the search [in that case] would have been justified anyway under the search-incident-to-arrest doctrine, which according to *Chimel* [v. *California*, 395 U.S. 752 (1969)] and *Riley* turns on the same rationale regarding the preservation of evidence that the Supreme Court explicitly rejected in *McNeely*." App., *infra*, 32a.

In this setting, and because, under *Camara* v. *Municipal Court of San Francisco*, 387 U.S. 523 (1967), "a state cannot criminalize the refusal to consent to an illegal warrantless search," the dissent concluded that "the State may not constitutionally convict persons who exercise their 'constitutional right to insist that [police] obtain a warrant.'" App., *infra*, 33a, 34a (quoting *Camara*, 387 U.S. at 540 (bracketed material added by the court)).

4. The court below subsequently denied a petition for rehearing, while noting that "members of the court disagree about the effect of" this Court's deci-

sion in *McNeely* and *Schmerber* v. *California*, 384 U.S. 757 (1966)." App., *infra*, 62a.

REASONS FOR GRANTING THE PETITION

There can be no denying that the issue presented here is one of great importance. As the dissent below recognized (and the majority did not deny), the Minnesota Supreme Court's holding "nullifies the warrant requirement in nearly every drunk-driving case" (App., *infra*, 22a); as a practical matter, that reads this Court's *McNeely* decision off the books. The decision below also imposes an indefensible limit on the search-incident-to-arrest exception—a matter of great importance in its own right, as "warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant." *Riley*, 134 S. Ct. at 2482. And that holding, which gives greater Fourth Amendment protection to the place where a person is standing than to the person's body, surely is wrong: "The Fourth Amendment lists 'persons' *first* among the entities protected against unreasonable searches and seizures." *Maryland* v. *King*, 133 S. Ct. 1958, 1982 (2013) (Scalia, J., dissenting) (emphasis in original). Consequently, the holding below should not stand.

A. Because a breath test is not administered to further officer safety or preserve evidence, it is not a valid search incident to arrest.

The court below recognized that criminalizing the refusal to submit to a search could be constitutional only if the requested search itself satisfies the Fourth Amendment's requirements. The court believed that condition to be satisfied here, however, because it understood this Court's decisions in *Riley*

and *Robinson* to hold that *any* search of an arrestee's person is a valid search incident to arrest. That holding was premised on a plain misunderstanding of this Court's decisions.

1. The search-incident-to-arrest exception does not per se *apply to all searches of the person.*

a. This Court has made clear time and again that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment." *Arizona* v. *Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz* v. *United States*, 389 U.S. 347, 357 (1967)). This fundamental rule is "subject only to a few specifically established and well-delineated exceptions." *Ibid.* This case concerns the nature of one of these exceptions, that for "a warrantless search incident to a lawful arrest." *Riley*, 134 S. Ct. at 2482.

Under the search-incident-to-arrest exception, this Court has held permissible (1) searches of the person of the arrestee and (2) searches of the area within the control of the arrestee. *Riley*, 134 S. Ct. at 2483; *Robinson*, 414 U.S. at 224. In both circumstances, however, the Court has been very clear on the exception's rationale. First, "[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape." *Chimel* v. *California*, 395 U.S. 752, 762-63 (1969). And second, an arresting officer may "search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Id.* at 763. These two *Chimel* rationales "ensure[] that the scope of a search incident to arrest is commensurate with its

purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." *Gant*, 556 U.S. at 339. The Court repeatedly has reaffirmed the limits on the search-incident-to arrest exception stated in *Chimel*, which "laid the groundwork for most of the existing search incident to arrest doctrine." *Riley*, 134 S. Ct. at 2483. *See Robinson*, 414 U.S. at 235; *Gant*, 556 U.S. at 338.

b. The court below acknowledged that these rationales limit the scope of the search-incident-to-arrest exception as it applies to the search of the "*area* where the defendant was arrested or a search of *items* near the defendant." App., *infra*, 12a. And the court recognized that "the State in this case cannot show that a search of [petitioner's] breath was related to officer safety or concerns that he would destroy evidence." *Id.* at 11a & n.7.[1] Yet the court below held that the search-incident-to-arrest exception nevertheless applies because the majority believed that the limitations described by this Court in *Riley*, *Gant*, *Robinson*, and *Chimel* do not apply to "the warrantless search of the *body* of a person validly arrested." App., *infra*, 12a (emphasis added). Thus, un-

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[1] The rationales underlying the search-incident-to-arrest exception do not apply to chemical alcohol tests generally. As this Court recognized in *McNeely*, blood alcohol content dissipates at a steady, predictable rate—and, in any event, dissipation is wholly beyond the control of a person in custody. The concern about destuction of evidence therefore cannot, without more, justify the search of a person's deep-lung air. Nor is the officer-safety rationale relevant. Just like the digital cell phone data at issue in *Riley*, a person's breath "cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape." *Id.* at 2485.

der the holding below, searches of an arrestee's body do not require *any* justification if they are associated with an arrest.

This holding can fairly be said to turn Fourth Amendment doctrine on its head, and simply cannot be reconciled with this Court's decisions. "No right is held more sacred, or is more carefully guarded, * * * than the right of every individual to the possession and control of his *own person*, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968) (emphasis added). For this reason, the *Chimel* rationales apply both to property found on or near the arrestee *and* to the person of the arrestee. Although the court below believed otherwise, that seemingly self-evident point was affirmed in *all* of this Court's search-incident-to-arrest decisions: as the Court explained in *Riley*, in *Robinson* "the Court *applied* the *Chimel* analysis in the context of a search of the arrestee's person." 134 S. Ct. at 2483 (emphasis added); see *id.* at 2484 ("*Gant*, like *Robinson*, recognized that the *Chimel* concerns for officer safety and evidence preservation underlie the search incident to arrest exception"). The majority below cited no decision of this Court that authorized *per se* searches incident to arrest inside a person's body; as the dissenters explained, "[t]he reason is that no such case exists." App., *infra*, 28a.

That necessarily is so. It would be perverse to suggest that a greater degree of justification is required for a search of an arrestee's *property* and of the area surrounding him than for a search inside the arrestee's *body*. After all, "the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. This Court has repeatedly stressed "the unique,

significantly heightened protection afforded against searches of one's person." *Wyoming* v. *Houghton*, 526 U.S. 295, 303 (1999); see *King*, 133 S. Ct. at 1969 ("Virtually any intrusio[n] into the human body * * * will work an invasion of cherished personal security * * * * *"). For that reason, the Court held in *Schmerber* that the rationales for a search incident to arrest "have little applicability with respect to searches involving intrusions beyond the body's surface," as "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." 384 U.S. at 769-70. The contrary rationale adopted below is plainly wrong.

In nevertheless holding that the search-incident-to-arrest exception applies here, the court below relied on the statement in *Robinson* (repeated in *Riley*) that searches of a person incident to arrest are permitted "regardless of 'the probability in a particular arrest situation that weapons or evidence would in fact be found.'" 134 S. Ct. at 2485 (quoting 414 U.S. at 235); see App., *infra*, 14a. But the court below missed this Court's point. Exceptions to the warrant requirement "do not require an assessment of whether the policy justifications underlying the exception * * * are implicated in *a particular case*." *McNeely*, 133 S. Ct. at 1559 n.3 (emphasis added). But this does not mean that *any* search of a person is automatically reasonable under the search-incident-to-arrest exception. Rather, the Court "ask[s] * * * whether application of the search incident to arrest doctrine to this particular *category* of [search] would 'untether the rule from the justifications underlying the *Chimel* exception.'" *Riley*, 134 S. Ct. at 2485 (quoting *Gant*, 556 U.S. at 343) (emphasis added). The necessary connection existed in *Robinson*, where

the "unknown physical objects" concealed in Robinson's cigarette pack "pose[d] risks, no matter how slight, during the tense atmosphere of a custodial arrest." *Riley*, 134 S. Ct. at 2485. But in sharp contrast, the breath test at issue here (like the search of cell phone data at issue in *Riley* (see *id.* at 2485-2488))—which concededly *never* could have bearing either on officer safety or on evidence preservation—is a category of search that has *no* connection to the *Chimel* justifications.

c. In addition, as the dissent below recognized, the Minnesota Supreme Court's decision effectively vitiates this Court's holding in *McNeely*. The *McNeely* Court expressly disapproved a *per se* rule permitting blood alcohol tests under the exigent circumstances exception to the warrant requirement. 133 S. Ct. at 1563. That holding was a natural application of this Court's determination that "for the most part *per se* rules are inappropriate in the Fourth Amendment context." *United States* v. *Drayton*, 536 U.S. 194, 201 (2002). Yet the defendant in *McNeely* was arrested prior to being subjected to a warrantless blood draw. 133 S. Ct. at 1556-57. Accordingly, under the Minnesota Supreme Court's rule the officers in *McNeely* could have avoided the totality-of-the-circumstances inquiry required by this Court's *McNeely* decision simply by treating the alcohol test sought in that case as a search incident to arrest. This approach "nullifies the warrant requirement in nearly every drunk-driving case." App., *infra*, 22a.

d. The court below also attempted to support its holding by pointing to what it described as the "less-invasive nature of breath testing" (App., *infra*, 11a n.6), which it contrasted with blood or urine tests.

That reasoning, however, rested on a misreading of this Court's precedents that dangerously expands officers' ability to conduct searches inside an arrestee's body.

This Court has explicitly held that breath tests are searches for Fourth Amendment purposes. *Skinner* v. *Ry. Labor Execs.' Ass'n.*, 489 U.S. 602, 616-17 (1989); *see McNeely*, 133 S. Ct. at 1569. And although the reduced privacy interests of an arrestee have some bearing on application of the search-incident-to-arrest exception (see *Riley*, 134 S. Ct. at 2488-89), a breath test of the sort at issue here is "a profound intrusion *into* a person's bodily integrity." App., *infra*, 28a (Page and Stras, JJ., dissenting). Such a test does not capture an ordinary breath of the kind that routinely is exposed to the public. Instead, it "requires a sample of 'alveolar' (deep lung) air; to assure that such a sample is obtained, the subject is required to blow air into the [breathalyzer] at a constant pressure for a period of several seconds." *California* v. *Trombetta*, 467 U.S. 479, 481 (1984).

The Datamaster, Minnesota's current breath test device, operates in this manner. To obtain a breath sample, an officer must "[i]nsert a mouthpiece and instruct the subject to provide a long and steady sample." David Eden et al., *Datamaster DMT Breath Test Operator Training Course Manual*, Minn. Dep't of Pub. Safety, 51 (Nov. 5, 2013), https://goo.gl/nQck7R. The DMT requires at least 1.5 liters of air, provided "in a single exhalation" at a rate of 3.0 liters per minute or greater. *Ibid.* "If the subject stops blowing before the instrument notes a uniformity of concentration (deep lung or alveolar air), the breath sample will not be accepted." *Id.* at 23. Because of the intrusive nature of this testing regime,

"[s]ubjecting a person to a breathalyzer test, * * * implicates similar concerns" "about bodily integrity" to blood tests. *Skinner*, 489 U.S. at 616-17. In terms of its interference with personal privacy and dignity interests, such a test is a very far cry from permissible examination of a "zipper bag," "billfold," "wallet," or "purse." *Riley*, 134 S. Ct. at 2488.

Additionally, "[i]n evaluating the reasonableness of police procedures under the Fourth Amendment," this Court "look[s] to prevailing rules in individual jurisdictions." *Tennessee* v. *Garner*, 471 U.S. 1, 15-16 (1985). The Court thus found it notable in *McNeely* "that a majority of States either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal * * * or prohibit nonconsensual blood tests altogether." *McNeely*, 133 S. Ct. at 1566 & n.9 (plurality opinion) (internal quotation marks omitted). Though not dispositive, the "wide-spread state restrictions on nonconsensual blood testing provide[d] further support for [this Court's] recognition that compelled blood draws implicate a significant privacy interest." *Id.* at 1567 (internal quotation marks omitted). And here as well, nearly all of the States that place restrictions on nonconsensual blood tests impose the same restrictions on nonconsensual breath tests.[2] This pro-

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[2] See Ala. Code § 32-5-192(a), (c) (2014); Alaska Stat. §§ 28.35.032(a), 28.35.035(a) (2014); Ariz. Rev. Stat. § 28-1321(D)(1); Ark. Code §§ 5-65-205(a)(1), 5-65-208(a)(1) (nonrelevant amendments enacted by 2015 Arkansas Laws Act 299); Conn. Gen. Stat. §§ 14-227b(b), 14-227c(b) (2014); Ga. Code § 40-5-67.1(d); Haw. Rev. Stat. § 291E-15 (2014); Iowa Code §§ 321J.6(1), 321J.9(1) (2014); Ky. Rev. Stat. § 189A.105(2)(b); La. Rev. Stat. § 32.666(A)(1)(a)(i), (2) (2014); Md. Transp. Code § 16-205.1(b)(i)(1), (c)(1); Mass. Gen. Laws, ch. 90, § 24(1)(e), (f)(1); Mich. Comp. Laws § 257.625d(1); Miss. Code § 63-11-21;

vides strong evidence that breath tests, like blood tests, are understood to implicate significant privacy interests.

Against this background, the Court has suggested that warrantless breath tests are *per se* reasonable only "when special needs, *beyond the normal need for law enforcement*, make the warrant and probable-cause requirement impracticable." *Skinner*, 489 U.S. at 619 (emphasis added) (internal quotation marks omitted). In *Skinner*, for instance, the highly regulated nature of the railroad industry, the need to keep both the regulated train operators themselves and their passengers safe, and especially the fact that the tests in that case were conducted not for prosecutorial purposes but rather to prevent accidents, all combined to create a compelling "special need" for testing. *Id.* at 620-621. But the Court recognized that "the privacy interests implicated by the toxicological testing at issue reasonably might be viewed as significant in other contexts" (*id.* at 628)—as they are in this one.

In the context of traffic stops, there are no "special needs" that justify warrantless breath tests. This Court has already determined that the natural dissipation of alcohol from blood does not, by itself, render the warrant requirement inapplicable. *McNeely*, 133

Mont. Code § 61-8-402(4), (5) (2014); Neb. Rev. Stat. § 60-498.01(2); N.H. Rev. Stat. § 265-A:14(I); N.M. Stat. § 66-8-111(A); N.Y. Veh. & Traf. Law §§ 1194(2)(b)(1), 1194(3); N.D. Cent. Code § 39-20-01.1(1); Okla. Stat., Tit. 47, § 753; Ore. Rev. Stat. § 813.100(2); 75 Pa. Cons. Stat. § 1547(b)(1) (2014); R.I. Gen. Laws §§ 31-27-2.1(b), 31–27–2.9(a); S.C. Code § 56-5-2950(B); Tex. Transp. Code §§ 724.012(b), 724.013; Vt. Stat., Tit. 23, § 1202(b), (f); Wash. Rev. Code. § 46.20.308(2)–(4); W. Va. Code §§ 17C-5-4(b), 17C-5-7; Wyo. Stat. § 31-6-102(d).

S. Ct. at 1568. And the test is given in this setting *only* as an element of "the normal need for law enforcement." There is, as a consequence, no justification for abrogation of the warrant requirement.

2. Because the proposed underlying search would be unconstitutional, Minnesota's test-refusal statute—which criminalizes refusal to submit to an unconstitutional search—also is unconstitutional.

Because the court below hinged its holding that Minnesota's test-refusal statute could be constitutionally applied on its belief that a breath test was justified by the search-incident-to-arrest exception, the holding must fall if that exception is inapplicable. It is fundamental that government may not criminalize a person's refusal to submit to an unconstitutional search—that is, a search that is unsupported by a warrant or a valid exception to the Fourth Amendment's warrant requirement. See *Camara*, 387 U.S. at 540; see also *See* v. *City of Seattle*, 387 U.S. 541 (1967) (companion case).

In *Camara*, a San Francisco city ordinance authorized city employees "upon presentation of proper credentials" to enter any building in the city. 387 U.S. at 526. A property owner was convicted of a crime for violating this ordinance by refusing to permit warrantless inspection of his apartment. Applying basic Fourth Amendment principles, this Court held that the owner "had a constitutional right to insist that the inspectors obtain a warrant to search" and that he "may not constitutionally be convicted for refusing to consent to the inspection." *Id.* at 540.

That principle applies fully here. Petitioner may not constitutionally be convicted for refusing to sub-

mit to a breath test unsupported by a warrant or a valid warrant exception. If anything, the Fourth Amendment interests at stake here are more vital than they were in *Camara*, which involved routine building inspections rather than searches by police officers as an element of a criminal investigation. Such searches plainly impinge on the "historic interests of 'self-protection'" at the core of the protections of the Fourth Amendment. *Camara*, 387 U.S. at 530 (citing *Boyd* v. *United States*, 116 U.S. 616 (1886)).[3]

3. Minnesota's statute may not be upheld on the alternative ground that implied-consent statutes are per se *reasonable or establish* actual *consent.*

The court below did *not* seek to justify the Minnesota regime on the theory that it is *per se* reasonable (the view of the state appellate court) or that Minnesota's recognition of deemed "consent" means that drivers *actually* consent to breath testing. That is for good reason: these sorts of rationales—which have been accepted by some other courts—are insupportable.

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[3] Although *Camara* involved a suspicionless search rather than one based on probable cause, what made the search defective was the lack of a warrant or other equivalent justification; the Court took issue with the search not because it was suspicionless but because it was warrantless. Indeed, the Court in *Camara* overruled a prior decision, *Frank* v. *Maryland*, 359 U.S. 360 (1959), despite the fact that the ordinance upheld in *Frank* required the inspector to "have cause to suspect" a violation before demanding entry without a warrant. *Camara*, 387 U.S. at 530 (citing *Frank*, 364 U.S. at 264, 265). By its own terms, then, *Camara* applies whether or not the State had cause to initiate the search.

For example, in *State* v. *Birchfield*, 858 N.W.2d 302, 2010 (N.D. 2015), cert. pending, No. 14-____ (filed June 12, 2015), the North Dakota Supreme Court held that a criminal test-refusal statute is "reasonable because it is an efficient tool in discouraging drunk-driving." 858 N.W.2d 302, 310 (N.D. 2015). On balance, the court reasoned, the State's interest in reducing drunk driving outweighs the intrusion on the searched individual's privacy. *Id.* at 309. In addition, the North Dakota court reasoned that entitlement to drive may be conditioned on the driver's agreement to consent to a chemical test and that the "unconstitutional conditions doctrine" is not implicated where, as here, the State merely "criminalizes the refusal to submit to a chemical test but does not authorize a warrantless search." *Id.* at 308. The court added that "the giving of the implied consent advisory informing the arrestee that refusing a chemical test is a crime does not render consent to the test involuntary." *Id.* at 310. See also, *e.g.*, *State* v. *Washburn*, 2015 WL 630868 (N.D. 2015); *Williams* v. *State*, 2015 WL 3511222, at *8-9 (Fla. Dist. Ct. App. 2015). But that analysis cannot be squared with this Court's holdings, for two reasons.

First, by relying on the "general reasonableness" of implied consent statutes as a matter of public policy, these courts depart from the principle of individualized assessment that lies at the core of Fourth Amendment doctrine. Only in extraordinary circumstances may public officials employ sweeping warrantless searches. See *Skinner*, 489 U.S. at 619. Yet a routine DUI investigation, like the one in this case, is among the most ordinary of law enforcement functions and must be analyzed according to traditional Fourth Amendment principles, which preclude an "overly broad categorical approach * * * in a context

where significant privacy interests are at stake." *McNeely*, 133 S. Ct. at 1564. It is for this reason that the court below properly repudiated the reasoning of the Minnesota Court of Appeals.

This context, moreover, is one where a warrant serves a clear and essential purpose. The application of blood alcohol tests plainly is "subject to the judgment of officers whose perspective might be colored by their primary involvement in the often competitive enterprise of ferreting out crime." *King*, 133 S. Ct. at 1970 (citations and internal quotation marks omitted). Thus, under the Minnesota and North Dakota statutes, the officer in the field has complete discretion both as to both whether a test is administered at all and, if one is administered, whether the test is to be of breath, blood, or urine. This is the paradigmatic situation where "discretion * * * could properly be limited by the 'interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer.'" *King*, 133 S. Ct. at 1969 (citation omitted; bracketed material added by the Court).

Second, the fiction of driver consent cannot support the warrantless search proposed here. Prior to the decision in *McNeely*, some courts accepted the argument that an implied-consent statute could function as an independent exception to the warrant requirement.[4] A common theme of these decisions was that driving is a privilege and that drivers consent in advance to warrantless chemical tests in re-

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[4] See *State* v. *Wells*, 2014 WL 4977356, at *6-8 (Tenn. Crim. App. 2014) (collecting cases); *Aviles* v. *State*, 385 S.W.3d 110 (Tex. App. 2012), cert. granted, judgment vacated and remanded for consideration in light of *McNeely*, 134 S. Ct. 902 (2014).

turn for the grant of this privilege. See, *e.g.*, *State v. Janosky*, 2000 WL 1449367 (Tenn. Crim. App. 2000).

After *McNeely*, however, "[t]he vast majority of courts have found that statutory implied consent is not equivalent to Fourth Amendment consent." *Williams*, 2015 WL 3511222, at *5 & n.4 (citing cases). These courts have recognized that "an implied consent statute * * * does not justify a warrantless blood draw from a driver who refuses to consent[] * * * or objects to the blood draw * * *. Consent to a search must be voluntary. * * * Inherent in the requirement that consent be voluntary is the right of the person to withdraw that consent." *State* v. *Halseth*, 339 P.3d 368, 371 (Idaho 2014).[5]

That conclusion surely is correct: "allowing implied-consent statutes to constitute a per se, categorical exception to the warrant requirement would make a mockery of the many precedential Supreme Court cases that hold that voluntariness must be determined based on the totality of the circumstances." *Williams*, 2015 WL 3511222, at *6. It also "would de-

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[5] See *State* v. *Butler*, 302 P.3d 609, 613 (Ariz. 2013); *Flonnory* v. *State*, 2015 WL 374879, at *4 (Del. 2015) (unpublished); *Byars* v. *State*, 336 P.3d 939, 945-946 (Nev. 2014) (striking down a provision of the State's implied consent law on the ground that the statute could not by itself authorize a warrantless blood draw); *State* v. *Arrotta*, 339 P.3d 1177, 1178 (Idaho 2014); *State* v. *Wulff*, 337 P.3d 575, 582 (Idaho 2014); *State* v. *Fierro*, 853 N.W.2d 235, 241 (S.D. 2014); *Reeder* v. *State*, 428 S.W.3d 924, 930 (Tex. App. 2014); *State* v. *Declerck*, 317 P.3d 794, 804 (Kan. Ct. App. 2014); *United States* v. *Brown*, 2013 WL 5604589, at *4 & n.1 (D. Md. 2013). But see *State* v. *Yong Shik Won*, 332 P.3d 661, 681 n. 23 (Haw. Ct. App. 2014) ("In effect, by exercising the privilege of driving, a driver (like Won) consents to submit to a breath test.").

vour the *McNeely* rule and contradict *McNeely*'s general reasoning that these cases must be decided using a totality-of-the-circumstances approach." *Id.*

Moreover, the notion that a driver "consents" to a warrantless unjustified search in return for the privilege of driving would violate the doctrine of unconstitutional conditions, at least when the driver is unable to revoke that consent free of criminal penalty. As noted above, individuals have a Fourth Amendment right to refuse to permit an illegal warrantless search under the rule of *Camara*. Test-refusal statutes violate the doctrine of unconstitutional conditions insofar as they condition the privilege of driving on the surrender of that right.

The "unconstitutional conditions doctrine * * * vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). Thus, the "'government may not grant a benefit on the condition that the beneficiary surrender a constitutional right.'" *Amelkin* v. *McClure*, 330 F.3d 822, 827-828 (6th Cir. 2003) (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989)); see also Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 67 (1988) ("In its canonical form, this doctrine holds that even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights.") As this Court has long recognized, it would be a "palpable incongruity" to strike down a legislative act that expressly divests a person of rights guaranteed by the Consti-

tution, but to uphold an act "by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold." *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 593 (1926).

In States like Minnesota and North Dakota, citizens must either abstain from driving or "consent" in advance to heavy criminal penalties if they later refuse a chemical test—even if that test is unsupported by a warrant or a recognized exception to the warrant requirement. Like a city that uses its monopoly on zoning licenses to impose unconstitutional conditions on homeowners, these states use their monopoly on driver's licenses to coerce the surrender of constitutional rights. And unlike some government benefits, driving is a necessity for millions of people who cannot earn a livelihood or participate meaningfully in society without it.[6] Cf. *Lebron* v. *Sec'y, Florida Dep't of Children & Families*, 710 F.3d 1202, 1214-15 (11th Cir. 2013) (holding that Florida could not mandate "consent" to warrantless drug testing for welfare applicants because this forced them to choose between exercising Fourth Amendment rights and receiving financial assistance).[7] This regime plainly

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[6] The U.S. Census Bureau estimates that 86.1% of American workers—more than 100 million people—commute to work by car, truck, or van. U.S. Census Bureau, Commuting in the United States: 2009, http://perma.cc/4N9Y-8LBR.

[7] In response to this argument, some courts rely on *South Dakota* v. *Neville*, 459 U.S. 553, 560 (1983), in which this Court upheld a test-refusal statute against a Fifth Amendment challenge. See, e.g., *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013); *State* v. *Johnson*, 2014 WL 2565771, at *4 (Minn. Ct. App. 2014). In *Neville*, South Dakota law provided that a driver's re-

is coercive—and "[w]here there is coercion, there cannot be consent." *Bumper* v. *North Carolina*, 391 U.S. 543, 550 (1968). Accordingly, the implied consent rationale endorsed in *Birchfield*, and properly rejected by many other courts, cannot support the holding below.

B. State and federal courts are split over whether chemical alcohol tests constitute reasonable searches incident to arrest.

In addition, the holding below departs from more than this Court's doctrine; it also contributes to a conflict in the lower courts on whether the search-incident-to-arrest exception justifies warrantless chemical tests in DUI cases.

As the Minnesota Supreme Court recognized (App., *infra*, 9a-10a), a number of federal and state courts have upheld blood alcohol tests under the

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fusal to take a chemical test could be introduced as evidence against him at trial; the defendant argued that this violated his right against self-incrimination. The Court found that the statute fell short of the "physical or moral compulsion" necessary to produce an infringement of the Fifth Amendment. *Id.* at 562. But the test-refusal statute at issue in *Neville* was not as coercive as Minnesota's; it provided only for an adverse jury inference, without imposing independent criminal penalties. Moreover, as the *Neville* Court was careful to note, "the fact the government gives a defendant or suspect a 'choice' does not always resolve the compulsion inquiry" because, depending upon the circumstances, a government-imposed choice may result in a "cruel [di]lemma." *Id.* at 563. That surely is the case here, where refusal to submit to the test makes a person guilty of a criminal offense—and subject to very onerous criminal penalties, possibly including a mandatory, multi-year prison sentence—whether or not the person in fact committed the separate offense of driving while impaired.

search-incident-to-arrest exception, including the Fourth, Eighth, Ninth, and Eleventh Circuits and courts in Alaska, Ohio, Oregon, Pennsylvania, and Wisconsin.[8] Although a few of these decisions based their holdings on the possibility of destruction of evidence (see *Dodd*, 623 F.3d at 568; *Reid*, 929 F.2d at 994; *Wing*, 268 P.3d at 1110; and *Seibel*, 471 N.W.2d at 233), the rest adopted the same *per se* rule as did the court below. See *Burnett*, 806 F.2d at 1450; *Byrd*, 783 F.2d at 1005; *Wing*, 268 P.3d at 1110; *Hill*, 2009 WL 1485026, at *5; *McClure*, 335 P.3d at 1263; and *McFarren*, 525 A.2d at 1188.

Other courts, however, have determined that chemical alcohol tests may *not* be justified by the search-incident-to-arrest doctrine. These include the Sixth Circuit (see *United States* v. *Berry*, 866 F.2d 887, 891 (6th Cir. 1989) ("The rationale for a search incident to arrest exception does not directly support the taking of a blood test without the suspect's consent.")), and the highest available reviewing courts of Maine (see *State* v. *Baker*, 502 A.2d 489, 492 (Me. 1985) (finding that this Court has "reject[ed] the doctrine of search incident to arrest as a sufficient basis for the taking of an involuntary blood test")); Mis-

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[8] See *United States* v. *Reid*, 929 F.2d 990, 994 (4th Cir. 1991); *Dodd* v. *Jones*, 623 F.3d 563, 568 (8th Cir. 2010); *Burnett* v. *Municipality of Anchorage*, 806 F.2d 1447, 1450 (9th Cir. 1986); *Byrd* v. *Clark*, 783 F.2d 1002, 1005 (11th Cir. 1986), abrogated in part on other grounds by *Nolin* v. *Isbell*, 207 F.3d 1253 (11th Cir. 2000); *Wing* v. *State*, 268 P.3d 1105, 1110 (Alaska Ct. App. 2012); *State* v. *Hill*, 2009 WL 1485026, at *5 (Ohio Ct. App. 2009); *State* v. *McClure*, 335 P.3d 1260, 1263 (Or. 2014) (en banc); *Commonwealth Dep't of Transp.* v. *McFarren*, 525 A.2d 1185, 1188 (Pa. 1987); *State* v. *Seibel*, 471 N.W.2d 226, 233 (Wis. 1991).

souri (see *State* v. *McNeely*, 358 S.W.3d 65, 72 n.5 (Mo. 2012) (en banc), aff'd, 133 S. Ct. 1552 (2013) ("To the extent that [previous cases] interpret *Schmerber* to allow a nonconsensual warrantless blood draw incident to arrest in DWI cases without other exigent circumstances, they are no longer to be followed.")); New Hampshire (see *State* v. *Stern*, 846 A.2d 64, 68 (N.H. 2004) (ruling on state constitutional grounds but citing *State* v. *Wong*, 486 A.2d 262 (N.H. 1984), which the court noted was "decided under federal law") ("To be constitutional, the exigent circumstances exception to the warrant requirement must apply.")); North Carolina (*State* v. *Welch*, 342 S.E.2d 789, 794 (N.C. 1986) (blood draws require warrant "unless probable cause and exigent circumstances exist")); and Texas (see *State* v. *Villarreal*, 2014 WL 6734178, at *15 (Tex. Crim. App. 2014), reh'g granted (Feb. 25, 2015) ("[T]he search-incident-to-arrest exception is inapplicable [to blood tests].")).[9] See also *Williams*, 2015 WL 3511222, at *7 ("breath-alcohol tests are not justified by either of the rationales for the [search-incident-to-arrest] exception").

The court below noted some of these contrary holdings but distinguished them as applying to blood tests rather than breath tests, finding the differences between the two sorts of test to be "material." App., *infra*, 10a-11a n.6. The conflicting decisions, however, cannot be explained away in this manner. First, as discussed above, this Court's decisions show that

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[9] Although rehearing has been granted in *Villarreal*, Texas's petition for rehearing did not question the court's holding on the search-incident-to-arrest doctrine. See generally Petitioner's Amended Motion for Rehearing, *Villarreal*, No. PD-1306-14 (Tex. Crim. App. Dec. 19, 2014), available at http://goo.gl/RTMtgo.

breath tests, like blood tests, are significant invasions of privacy that must be limited by the Fourth Amendment; as we also have shown, most States treat blood and breath tests equivalently in this context, which is compelling evidence that the privacy interests at stake are equivalent. Second, nothing in the rationale of the Minnesota Supreme Court's decision prevents it from applying to blood tests. The court based its holding on the view that *all* searches of the person—including searches *inside* the body—are *per se* reasonable searches incident to arrest. Thus, although the court below observed that "the question of a blood or urine test incident to arrest is not before us" (*ibid*), nothing in its rationale is affected by the nature of the test. The court's logic creates an inexorable conflict with the rulings of other state and federal courts.[10]

C. The question presented is one of substantial and recurring importance.

The decision below accordingly departs from this Court's rulings and is in great tension with the holdings of other state and federal courts; that is reason enough for the Court to grant review. And the need for review is especially acute because the question presented in this case is one of exceptional practical

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[10] Indeed, other courts, like the North Dakota Supreme Court in *Birchfield*, have upheld the constitutionality of a test-refusal statute in the specific context of a requested blood test, albeit on a general reasonableness or implied consent rationale. See *Birchfield* Pet., at 4. It therefore is imperative that the Court settle the constitutionality of required tests in both contexts. For this reason, it would be appropriate for the Court to grant review both in this case and in *Birchfield*, so that it is presented with broadest range of rationales offered in defense of these laws and of factual contexts in which they apply.

and doctrinal importance. Thirteen States have statutes like Minnesota's that criminalize a driver's refusal to consent to a blood alcohol test.[11] These statutes affect many thousands of people every year.

Although nationwide statistics are unavailable, a report of the National Highway Traffic Safety Administraion tracked the number of convictions for test refusal at the county level. Ramsey County, Minnesota—a county with a population of about 500,000 people—reported over 1300 convictions for criminal test refusal over a three-year period. Nat'l Highway Traffic Safety Admin., Dep't of Transp., Traffic Safety Facts, Breath Test Refusals and Their Effect on DWI Prosecutions, DOT HS 811 551 (2012). Omaha, Nebraska—a city with a population of about 400,000—reported over 1200 convictions for criminal test refusal between 2004 and 2006. *Id.* Nationwide, it is certain that tens, and perhaps hundreds, of thousands of people are subjected to criminal penalties under these statutes every year—and if the arguments presented here are correct, the federal constitutional rights of all of these people are being infringed.

Moreover, there is considerable uncertainty about the constitutional rules that govern in this area, as the sharp division on the court below illustrates. As we have shown, courts upholding com-

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[11] Alaska (Alaska Stat. § 28.35.032); Florida (Fla. Stat. 316.1932); Hawaii (Haw. Rev. Stat. § 291e-68); Indiana (IC § 9-30-7-1); Kansas (Kan. Stat. § 8-1025); Louisiana (R.S. § 661(C)(1)(f)); Minnesota (Minn. Stat. § 169A.20); Nebraska (Neb. Rev. Stat. §§ 60-6,211.02 and 60-6,197); North Dakota (N.D.C.C. § 39-08-01(1)(e)); Rhode Island (R.I. Gen. Laws § 31-27-2.1); Tennessee (Tenn. Code § 55-10-406); Vermont (23 V.S.A. § 1201(b)); Virginia (Va. Code § 18.2-268.3).

pelled-consent laws have applied widely varying and sometimes inconsistent rationales, some relying on the search-incident-to-arrest exception and others on a theory of general reasonableness—a theory rejected by the court below—or on implied consent. As we also have shown, courts likewise are divided within these categories, with some rejecting implied consent or search-incident-to-arrest as a justification to search.

And this doctrinal confusion has practical consequences, creating uncertainty about state authority in this area. That is a matter of considerable significance, as States continue to consider the adoption of criminal penalties for refusing a breath test. At least four States have considered such legislation in recent years (California (AB 614 (2009)); Mississippi (HB 201 (2007)); Missouri (SB 780 (2010)); Montana (SB 308 (2011))); and "States and other governmental entities which enforce the driving laws" are considering the adoption of other "rules, procedures, and protocols that meet the reasonableness requirements of the Fourth Amendment" in response to this Court's decision in *McNeely*. 133 S. Ct. at 1569 (Kennedy, J., concurring in part).

In saying this, we of course recognize that "'[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *McNeeley*, 133 S. Ct. at 1565 (quoting *Michigan Dept. of State Police* v. *Sitz*, 496 U.S. 444, 451 (1990)). But States have made use of an extensive range of approaches in addressing drunk driving.

Among other options, 28 States treat test refusals a prior offense; 32 States have enacted alcohol laws that permit insurance companies to deny claims

associated with the consumption of alcohol; 37 States permit the use of sobriety checkpoints; 37 States impose administrative penalties for test refusal that exceed penalties for over-the-limit samples; 30 States hold establishments like bars and restaurants liable for serving alcohol to individuals who cause injuries as a result of intoxication; and all 50 States require some DWI offenders to equip their vehicles with ignition interlock devices.[12] These States also make use of implied-consent laws that impose "significant consequences" *other* than the imposition of criminal penalties when a motorist withdraws consent, including suspension of the driver's license and use of the test refusal in court. *McNeely*, 133 S. Ct. at 1566. Whatever ultimately is thought to be the constitutionality of these various approaches, the significance of the issue makes it imperative that this Court provide guidance in this context on the application of law enforcement tools that are both effective and consistent with the requirements of the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[12] Robert B. Voras et al., *Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, 40 J. Safety Res. 77 (2009); Nat'l Highway Traffic Safety Admin., Digest of Impaired Driving and Selected Beverage Control Laws (2013); *Dram Shop Civil Liability and Criminal Penalty Statutes*, Nat'l Conference of State Legislators (June 14, 2013), http://goo.gl/97Xd7s

Respectfully submitted.

JEFFREY S. SHERIDAN
Sheridan & Dulas, P.A.
320 Eagandale Center
1380 Corporate Center Curve
Eagan, MN 55121
(651) 686-7870

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic[1]
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

JUNE 2015

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[1] The representation of petitioner by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

APPENDICES

APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT
A13-1245

Court of Appeals
Gildea, C.J.
Dissenting, Page and Stras, JJ.

State of Minnesota,
Respondent,
vs.
William Robert Bernard, Jr.,
Appellant.

Filed: February 11, 2015
Office of Appellate Courts

Lori Swanson, Attorney General, Saint Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Tori K. Stewart, Assistant County Attorney, Hastings, Minnesota, for respondent.

Jeffrey S. Sheridan, Strandemo, Sheridan & Dulas, P.A., Eagan, Minnesota; and Steven T. Grimshaw, Minneapolis, Minnesota, for appellant.

Charles A. Ramsay, Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota, for amicus curiae Minnesota Society for Criminal Justice.

Teresa J. Nelson, American Civil Liberties Union of Minnesota, Saint Paul, Minnesota; and

Howard Bass, Bass Law Firm, PLLC, Burnsville, Minnesota; and

Nicole Moen, Fredrikson & Byron, P.A., Minneapolis, Minnesota, for amicus curiae American Civil Liberties Union of Minnesota.

William A. Lemons, Minnesota County Attorneys Association, Saint Paul, Minnesota, for amicus curiae Minnesota County of Attorneys Association.

SYLLABUS

1. Because a warrantless search of appellant's breath would have been constitutional as a search incident to a valid arrest, charging appellant with violating Minn. Stat. § 169A.20, subd. 2 (2014), for refusing to take a breathalyzer in this circumstance does not implicate a fundamental right.

2. Because Minn. Stat. § 169A.20, subd. 2, is a reasonable means to a permissive object, it does not violate appellant's right to due process under the United States or Minnesota Constitutions.

Affirmed.

OPINION

GILDEA, Chief Justice.

Minnesota law makes it a crime for a driver to refuse a request to take a chemical test to detect the presence of alcohol if certain conditions are met, including that the driver has been validly arrested for driving while impaired. Minn. Stat. § 169A.20, subd. 2 (2014). The question presented in this case is whether Minn. Stat. § 169A.20, subd. 2 ("test refusal statute"), violates appellant William Robert Bernard's right to due process under the United States

or Minnesota Constitutions by criminalizing his refusal to consent to an unconstitutional search. The district court held the test refusal statute was unconstitutional as applied to Bernard, but the court of appeals reversed. Because we conclude that the breath test the police asked Bernard to take would have been constitutional as a search incident to a valid arrest, and as a result, charging Bernard with criminal test refusal does not implicate a fundamental right, and that the test refusal statute is a reasonable means to a permissive object, we affirm.

This case arises from a report that police received on August 5, 2012, that three intoxicated men were attempting to get a boat out of the water at a boat launch in South Saint Paul. When police arrived at the boat launch, a witness told the officers that the men's truck became stuck in the river while they were trying to pull their boat out of the water. The witness also said that the driver of the truck was in his underwear. The officers approached the three men and saw that the truck's axle was hanging over the edge of the pavement. One of the men, appellant William Robert Bernard, was in his underwear. The officers could smell a strong odor of alcohol coming from the group. Bernard admitted to police that he had been drinking, but he and the other men denied driving the truck. Several additional witnesses identified Bernard as the driver and described him stumbling from the boat to the truck. As the officers questioned Bernard, they noted that his breath smelled of alcohol, he had bloodshot, watery eyes, and he was holding the keys to the truck. Bernard refused to perform field sobriety tests.

The officers arrested Bernard on suspicion of driving while impaired ("DWI") and took him to the

South Saint Paul police station. The officers read Bernard the Minnesota Implied Consent Advisory as required by Minn. Stat. § 169A.51, subd. 2 (2014). Specifically, police advised Bernard that Minnesota law required him to take a chemical test, that refusal to take a test was a crime, and that he had a right to consult with an attorney so long as there was not an unreasonable delay in the administration of the test. Police also gave Bernard an opportunity to contact an attorney. Bernard called his mother instead. After the call to his mother, Bernard told the officers he did not need any more time and refused to take a breath test.

The State charged Bernard with two counts of first-degree test refusal, Minn. Stat. §§ 169A.20, subd. 2, 169A.24 (2014).[1] Bernard filed a motion to dismiss, arguing that the test refusal statute violated due process because the statute makes it a crime to refuse an unreasonable, warrantless search of a driver's breath. The district court ruled that the test refusal statute was not unconstitutional on its face but dismissed the charges after concluding that the police lacked a lawful basis to search Bernard without a warrant. The court of appeals reversed, holding that prosecuting Bernard for refusal to take a breath test did not violate his due process rights because the facts of the case established that the officers had

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[1] A person is guilty of first-degree driving while impaired or criminal test refusal if that person "commits the violation within ten years of the first of three or more qualified prior impaired driving incidents." Minn. Stat. § 169A.24, subd. 1(1). A "qualified prior impaired driving incident" includes prior impaired driving convictions. Minn. Stat. § 169A.03, subd. 22 (2014). Bernard has four impaired driving convictions since 2006.

probable cause and could have secured a warrant to search Bernard's breath. We granted review.

I.

The test refusal statute, Minn. Stat. § 169A.20, subd. 2, makes it a crime to refuse a chemical test administered to detect the presence of alcohol in certain circumstances. *Id.* ("It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication) or 169A.52 (test refusal or failure; revocation of license)."). These circumstances include when an officer has probable cause to believe the person was driving, operating, or in physical control of a motor vehicle while under the influence of alcohol and the police have read the person the implied-consent advisory. *See* Minn. Stat. § 169A.51, subds. 1-2.

Bernard argues that Minnesota's test refusal statute, as applied to him, violates his right to substantive due process because it criminalizes his Fourth Amendment right to refuse an unconstitutional, warrantless search.[2] The Fourth Amendment

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[2] Bernard's brief states that "the district court should have found the statute unconstitutional on its face." But Bernard makes no argument in his brief explaining how the statute is unconstitutional in all applications. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (stating that a facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid"). Instead, Bernard's brief is devoted to arguing that Minnesota's test refusal law is unconstitutional as applied to him in this case. We therefore treat Bernard's appeal as an as-applied challenge. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that an issue "not argued in the briefs" is waived). In addition, counsel for Bernard seemed to make a broader argument at the hearing on

protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[3] U.S. Const. amend. IV. The "ultimate measure" of a permissible government search under the Fourth Amendment is reasonableness. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995). Because Bernard bases his due process argument on a Fourth Amendment violation, we turn first to the question of whether a warrantless search of Bernard's breath would have been constitutional under the Fourth Amendment.

A.

The court of appeals held that the criminal charges against Bernard for refusing the breath test were constitutional under the Fourth Amendment because the officer had probable cause to believe that Bernard was driving under the influence and the officer could have sought and received a warrant based on that evidence. *State v. Bernard*, 844 N.W.2d 41, 47 (Minn. App. 2014). The court did not find an exception to the warrant requirement for the search of Bernard's breath. *Id.* at 45–46. Instead, it concluded that probable cause sufficient to support a warrant

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this matter, asserting that the statute is unconstitutional on its face because there is not a categorical exception to make all warrantless breath tests under the statute constitutional. We will not consider this argument because Bernard did not raise it in his brief. *State v. Morrow*, 834 N.W.2d 715, 724 n.4 (Minn. 2013) (stating that an issue argued at oral argument, but not raised in the briefs is waived).

[3] Bernard also references the Minnesota Constitution's prohibition against unreasonable searches and seizures. *See* Minn. Const. art. I, § 10. Bernard, however, is not asking us to extend broader search and seizure protection under the Minnesota Constitution than what the Fourth Amendment affords.

was enough to support the criminal test-refusal charge. *Id.*

The court of appeals' analysis is contrary to basic principles of Fourth Amendment law. A warrantless search is generally unreasonable, unless it falls into one of the recognized exceptions to the warrant requirement. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). On several occasions, the U.S. Supreme Court has explicitly rejected an exception to the warrant requirement based upon probable cause alone. *See, e.g., Katz v. United States*, 389 U.S. 347, 356–57 (1967); *Beck v. Ohio*, 379 U.S. 89, 96 (1964). We have also recognized that there is no probable cause exception to the warrant requirement. *See State v. Ortega*, 770 N.W.2d 145, 149 n.2 (Minn. 2009). Consistent with this precedent, we refuse to embrace the rule the court of appeals applied in this case.

Although the court of appeals' reasoning does not provide a basis for a constitutional search, the State advances several other theories for why a search of Bernard's breath would have been constitutional. One such argument is that police could have conducted a warrantless search of Bernard's breath as a search incident to a valid arrest. Bernard contends that because there is nothing he can do to destroy the evidence of alcohol concentration in his body, the search-incident-to-arrest exception does not apply to a search of his breath under *Arizona v. Gant*, 556 U.S. 332 (2009), and *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552 (2013).

A search incident to a lawful arrest is a well-recognized exception to the warrant requirement under the Fourth Amendment. *Gant*, 556 U.S. at 338; *see also Weeks v. United States*, 232 U.S. 383, 392

(1914) (explaining that the right "to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime" has been "uniformly maintained" in many cases "under English and American law"), *overruled on other grounds by Elkins v. United States*, 364 U.S. 206 (1960). Under this exception, the police are authorized to conduct a "full search of the person" who has been lawfully arrested. *United States v. Robinson*, 414 U.S. 218, 235 (1973). Our court has allowed searches of the body beyond a pat down of those police have lawfully arrested. For example, we have held that the warrantless inspection of an arrested man's penis was a valid search incident to arrest, noting that someone "lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person." *State v. Riley*, 303 Minn. 251, 254, 226 N.W.2d 907, 909 (1975). We have also upheld the taking of fingerprints and photographs of someone who has been arrested. *State v. Bonner*, 275 Minn. 280, 287, 146 N.W.2d 770, 775 (1966); *see also State v. Emerson*, 266 Minn. 217, 221, 123 N.W.2d 382, 385 (1963) (noting that subjecting an arrested man to photographs, X-rays, and a medical examination did not violate his due process rights).

Taking a sample of an arrestee's breath is not materially different from the warrantless searches upheld in these cases.[4] Based on this authority, we

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[4] The dissent argues that our holding "fundamentally departs from longstanding Fourth Amendment principles." A search of an arrestee's breath, however, is not a departure from search-incident-to-arrest exception case law. Courts have upheld a variety of searches that included the removal of biological material and searches within the arrestee's body as valid searches incident to arrest. *See United States v. D'Amico*, 408 F.2d 331, 332-33 (2d Cir. 1969) (upholding the warrantless sei-

conclude that a warrantless breath test of Bernard would not have violated the Fourth Amendment because it is a search incident to Bernard's valid arrest.

Our conclusion that a warrantless breath test does not violate the Fourth Amendment because it falls under the search-incident-to-a-valid-arrest exception is consistent with decisions from other courts. *See, e.g.*, *United States v. Reid*, 929 F.2d 990, 994 (4th Cir. 1991) (holding that breathalyzer tests were reasonable searches under the Fourth Amendment because they were searches incident to lawful arrests); *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1450 (9th Cir. 1986) ("It is clear then that the breathalyzer examination in question is an appropriate and reasonable search incident to arrest which appellants have no constitutional right to refuse."); *Byrd v. Clark*, 783 F.2d 1002, 1005 (11th Cir. 1986) (holding that "officers would have been justified in conducting a [breath] search" under the search-incident-to-arrest exception); *Wing v. State*, 268 P.3d 1105, 1110 (Alaska Ct. App. 2012) (holding that a breath test was a valid search incident to arrest); *State v. Dowdy*, 332 S.W.3d 868, 870 (Mo. Ct. App. 2011) (same); *State v. Hill*, No. 2008-CA-0011, 2009 WL 1485026, at *5 (Ohio Ct. App. May 22,

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zure of a few strands of the arrestee's hair); *Espinoza v. United States*, 278 F.2d 802, 804 (5th Cir. 1960) (upholding a forcible search of an arrestee's mouth for narcotics). Courts have also upheld chemical testing conducted on parts of a defendant's body as a search incident to arrest. *See United States v. Johnson*, 445 F.3d 793, 795–96 (5th Cir. 2006) (upholding gunpowder residue testing done on defendant's hands as a search incident to arrest); *Jones v. State*, 74 A.3d 802, 812-13 (Md. Ct. Spec. App. 2013) (same and citing other cases so holding); *State v. Riley*, 500 S.E.2d 524, 533 (W. Va. 1997) (same); *Sen v. State*, 301 P.3d 106, 117–18 (Wyo. 2013) (same).

2009) (same); *Commonwealth, Dep't of Transp. v. McFarren*, 525 A.2d 1185, 1188 (Pa. 1987) (same).[5] Indeed, our research has not revealed a single case anywhere in the country that holds that a warrantless breath test is not permissible under the search-incident-to-a-valid-arrest exception.[6]

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[5] The dissent claims that our conclusion is unprecedented because our holding authorizes the collection of biological material from inside the defendant's body as a lawful search incident to arrest. The dissent is mistaken. As the cases we cited above indicate, courts for nearly 30 years have found a breath test is a lawful search incident to arrest. The dissent does not, and indeed cannot, cite any Supreme Court case holding that a search incident to arrest does not apply to biological material.

[6] The dissent is unable to find any contrary authority. Other courts, including the Texas Court of Criminal Appeals in the case cited by the dissent, have held that a blood test cannot be justified by the search-incident-to-arrest exception. *See, e.g.*, *State v. Baker*, 502 A.2d 489, 492–93 (Me. 1985) (rejecting the search-incident-to-arrest exception as justifying a warrantless blood draw, but upholding the test under the exigent circumstances exception); *State v. Stern*, 846 A.2d 64, 68 (N.H. 2004) (suggesting that exigent circumstances is the only exception that can justify a warrantless blood draw); *State v. Welch*, 342 S.E.2d 789, 794 (N.C. 1986) (same); *State v. Villarreal*, ___ S.W.3d ___, 2014 WL 6734178, at *18 (Tex. Crim. App. Nov. 26, 2014) (holding that the search-incident-to-arrest exception cannot justify a warrantless blood draw). Although not in the context of driving while impaired, we have also determined that a warrantless blood sample search was unconstitutional. *State v. Campbell*, 281 Minn. 1, 10, 161 N.W.2d 47, 54 (1968) ("[A]bsent unusual circumstances, an intrusion upon the body of a citizen should properly be made only by authority of a warrant issued by a magistrate, for it is a search and seizure within the limitations of the Fourth Amendment."). In this case, however, the officers did not ask Bernard to submit to a blood test. Therefore, the question of a blood or urine test incident to arrest is not before us, and we express no opinion as to whether a blood or urine test of a suspected drunk driver could be justified as a

B.

Bernard and the dissent argue, however, that the Supreme Court has been retracting the scope of searches that are constitutional under the search-incident-to-arrest exception. To support this argument, Bernard relies on *Arizona v. Gant*, 556 U.S. 332. *Gant*, however, did not address a search of a person; *Gant* involved the search of the *area* from which the defendant was arrested, specifically, the defendant's automobile. 556 U.S. at 336. As Bernard notes, the Court discussed that the search-incident-to-a-valid-arrest exception derives from concerns over officer safety and a desire to preserve evidence. *Id.* at 338. Because the police had secured the defendant in the back of a squad car, these concerns were nonexistent in *Gant* and the Court held that the warrantless search of the defendant's automobile did not fall under the search-incident-to-arrest exception. *Id.* at 351.

Similar to *Gant*, Bernard argues that the State in this case cannot show that a search of his breath was related to officer safety or concerns that he would destroy evidence. That may be true,[7] but it does not compel the conclusion that the search-incident-to-arrest exception does not apply here. This is so because there are two distinct types of searches that fall within the exception. *Robinson*, 414 U.S. at

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search incident to arrest. The differences between a blood test and a breath test are material, and not the least of those differences is the less-invasive nature of breath testing. *See Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 626 (1989) (stating that, unlike blood tests, breath tests do not "implicate[] significant privacy concerns").

[7] The State makes no argument in this case that the breath test was necessary to protect the safety of the officers or jailers from an intoxicated arrestee.

224. First, police may conduct a search "of the *person* of an arrestee by virtue of the lawful arrest." *Id.* Second, a search may be made of the area within the immediate control of the arrestee. *Id.* It is the first type of search—the search of the arrestee's person—that is relevant here.

There is no question that the Court has required either a concern for officer safety or a concern over the preservation of evidence to support the constitutionality of a warrantless search of the area where the defendant was arrested or a search of items near the defendant. But the Court has not applied these concerns as a limitation on the warrantless search of the body of a person validly arrested. A brief review of the Court's cases illustrates this distinction.

In *Chimel v. California*, the U.S. Supreme Court held that following an arrest, a police officer may search the person of the arrestee *and* the area within his or her immediate control to remove weapons and to seize evidence. 395 U.S. 752, 762–63 (1969). The Court explained that the search promoted officer safety and prevented the destruction or concealment of evidence. *Id.* at 763. A search of the arrestee's entire home, however, was not justified as a search incident to arrest. *Id.*

A few years later, in *United States v. Robinson*, the Court clarified the justification for the search of *a person* under the search-incident-to-arrest exception. In *Robinson*, a police officer arrested the defendant for driving with a revoked license and subsequently performed a patdown search. 414 U.S. at 220-23. The officer pulled an unidentified object from the defendant's pocket and discovered that it was a cigarette package. *Id.* at 223. Upon opening the package, the officer found 14 capsules of heroin. *Id.* The Court

held that the police lawfully discovered the heroin as part of a search incident to arrest. *Id.* at 236.

Through its holding, the U.S. Supreme Court overruled the analysis from the United States Court of Appeals for the District of Columbia Circuit. *Id.* at 237. The court of appeals concluded that the search-incident-to-arrest exception did not apply. *United States v. Robinson*, 471 F.2d 1082, 1108 (D.C. Cir. 1972). The exception did not apply because the police did not have reasonable grounds to believe that the defendant, who police arrested for driving after license revocation, would have any additional evidence of the crime on his person, and because there was no evidence that police were concerned for their safety when they searched the defendant. *Id.* at 1094, 1098 (D.C. Cir. 1972). The Supreme Court termed these limitations, within the context of a search of the person of a validly arrested defendant, as "novel" and rejected them. *Robinson*, 441 U.S. at 229. Rather than constricted by the limitations the appellate court had adopted, the Supreme Court referred to the police's "authority" to search an arrested person as "unqualified." *Id.* The Court held that "in the case of a lawful custodial arrest *a full search of the person* is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id.* at 235 (emphasis added). In other words, in *Robinson*, the Court characterized a warrantless search of a person as categorically reasonable under the Fourth Amendment as a search incident to that person's valid arrest. *See McNeely*, ___ U.S. at ___, 133 S. Ct. at 1559 n.3 (citing *Robinson*).

Subsequent cases have addressed and limited the second type of search under the search-incident-to-

arrest exception, a search of the area or things within the immediate control of the arrestee, but they have not narrowed the exception with respect to a search of the arrestee's body. *See Gant*, 556 U.S. at 351 (holding that the "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search"); *United States v. Chadwick*, 433 U.S. 1, 14-15 (1977) (holding that a locked footlocker seized at the time of a defendant's arrest could not be justified as a search of the area within the arrestee's immediate control "if the 'search is remote in time or place from the arrest' " or if the police have exclusive control of the property and "there is no longer any danger that the arrestee might gain access to the property" (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991).

Just last term, in *Riley v. California*, the Court addressed whether police could search a "particular category of effects"—digital data found within a cell phone seized during an arrest—without a warrant under the search-incident-to-arrest exception. ___ U.S. ___, 134 S. Ct. 2473, 2485 (2014). In concluding that the police could not search data on the cell phone as a search incident to arrest, the Court reaffirmed "*Robinson*'s admonition that searches of a person incident to arrest . . . are reasonable regardless of 'the probability in a particular arrest situation that weapons or evidence would in fact be found.' " *Id.* at ___, 134 S. Ct. at 2485 (quoting *Robinson*, 414 U.S. at 235). In a custodial arrest situation, those concerns are always present and do not need to be specifically identified or proven to justify a search. *Id.* at ___, 134 S. Ct. at 2484-85. Therefore, far from

overruling or narrowing *Robinson*, the Court recognized again *Robinson*'s "categorical rule," which allows a search of the person of an arrestee justified only by the custodial arrest itself, and simply chose not to extend that categorical exception to digital data found within a cellphone. *Id.* at ___, 134 S. Ct. at 2484.

The dissent reads *Riley* much differently than we do. It claims the Supreme Court in *Riley* "confirmed that when it refers to a search of a person incident to arrest, as in *Robinson*, it is talking about personal property—that is, evidence—found *on* a person." As support, the dissent cites to *Riley's* discussion of *Robinson*, 414 U.S. at 235, and *Chadwick*, 433 U.S. at 15. The dissent misreads *Riley*.[8]

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[8] The dissent's interpretation of *Riley* makes no logical sense. Even though the Court in *Riley* reaffirmed *Robinson*'s holding that "searches of a person" are lawful as part of a search incident to arrest without any additional showing by the government, *see Riley*, __ U.S. at __, 134 S. Ct. at 2485, the dissent asserts that the phrase "searches of a person" actually refers to personal property found on a person. We think that if the Supreme Court intended the phrase "searches of a person" to exclude searching the actual person, i.e., their body, and to only include searching personal property found on a person, the Court would have clearly said so. We are also hard pressed to understand how the police can even search personal property found on a person without first searching the actual person.

The dissent also claims that because the Supreme Court in *Riley* did not extend its holding from *Robinson* regarding the type of objects found on a person that may be categorically searched incident to arrest to digital content found within a cell phone, "the only logical conclusion is that the removal of breath (or blood or urine) from the body to discover an arrestee's blood alcohol level is not part of a search incident to arrest." We disagree. The search at issue in *Riley* was not a search of the defendant's body, like the search involved in this case, but a

In discussing these two cases in *Riley*, the Court explained that in *Robinson*, "the Court did not draw a line between a search of Robinson's person and a further examination of the cigarette pack found during that search." *Riley*, ___ U.S. at ___, 134 S. Ct. at 2484. The Court went on to explain that in *Chadwick*, it did make a distinction between a search of the person and the personal property, a footlocker that was in the exclusive control of law enforcement officers, found during that search. *Id.* at ___, 134 S. Ct. at 2484. It "clarified that this exception [requiring no additional justification for the search] was

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search of a physical object found on the defendant. In addition, the search that occurs when a breath test is taken is clearly distinguishable from the search of the contents of a person's cell phone. In *Riley*, the Court emphasized that even with the diminished expectation of privacy that comes with a custodial arrest, a search of a cell phone would be intrusive. *Riley*, ___ U.S. at ___, 134 S. Ct. at 2485. The Court noted that "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse" because they contain vast quantities of highly personal information about a person. *Id.* at ___, 134 S. Ct. at 2488-89. The same cannot be said for a breathalyzer test, which reveals nothing more than the level of alcohol in the arrestee's bloodstream. *See Skinner*, 489 U.S. at 625.

Finally, our conclusion that *Riley* did not limit the full body search of an arrestee authorized by *Robinson* is reinforced by other language in the opinion. The Court reiterated later in *Riley* that "we do not overlook *Robinson*'s admonition that searches of a person incident to arrest, 'while based upon the need to disarm and to discover evidence' are reasonable regardless of 'the probability in a particular arrest situation that weapons or evidence would in fact be found.'" *Riley*, ___ U.S. at ___, 134 S. Ct. at 2485 (quoting *Robinson*, 414 U.S. at 235). There would have been no need for the court to reaffirm its holding from *Robinson* regarding "searches of a person incident to arrest" if *Robinson* only authorized the search of personal property found on an arrestee. *Id.* at ___, 134 S. Ct. at 2485.

limited to 'personal property . . . immediately associated with the person of the arrestee.' " *Id.* at ___, 134 S. Ct. at 2484 (quoting *Chadwick*, 433 U.S. at 15). The dissent relies on this last sentence to support its interpretation of *Riley*.

When this quote is put in context, it is clear that the Court was not limiting the categorical search of an arrestee's body that may be performed as a search incident to arrest. Instead, the Court was explaining that *Chadwick* had limited the *type of property* that may be categorically searched as part of a search incident to arrest to property immediately associated with the arrestee. Moreover, because the searches being challenged in both *Riley* and *Chadwick* were not searches of the arrestee's body itself, it is hard to see how those cases can be read to have placed restrictions on such a search.

In short, we reject as unpersuasive both Bernard's and the dissent's arguments that *Gant* and *Riley* require us to conclude that the search-incident-to-arrest exception does not apply to the warrantless search of his breath.

Bernard also argues that the search-incident-to-arrest exception cannot apply to a breath test under *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552 (2013). The U.S. Supreme Court in *McNeely*, however, addressed only the exigent-circumstances exception to the warrant requirement. *Id.* at ___, 133 S. Ct. at 1556 (addressing whether the "natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for non-consensual blood testing in all drunk-driving cases"). The government did not raise the search-incident-to-arrest exception in its argument to the Supreme

Court.[9] *See* Brief for Petitioner, *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552 (2013) (No. 11-1425). In fact, *McNeely* only mentioned the search-incident-to-arrest exception by contrasting it with the exigent-circumstances exception to the warrant requirement, noting that unlike the exigent-circumstances exception, the search-incident-to-arrest exception is categorical and does not require a case-by-case assessment of the circumstances.[10] *McNeely*, ___ U.S. at ___, 133 S. Ct. at 1559 n.3. Therefore, the Supreme Court's decision in *McNeely* does not foreclose our decision regarding the search-incident-to-arrest exception to the warrant requirement.

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[9] A group of state attorneys general did argue that the search in *McNeely* was permissible under the search-incident-to-arrest exception. Brief for Delaware, et al. as Amici Curiae Supporting Petitioner at 7-20, *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552 (2013) (No. 11-1425). The U.S. Supreme Court, however, does not consider arguments "not raised by the parties or passed on by the lower courts." *F.T.C. v. Phoebe Putney Health Sys., Inc.*, ___ U.S. ___, 133 S. Ct. 1003, 1010 n.4 (2013).

[10] Specifically, the Supreme Court recognized that "searches of a person incident to a lawful arrest" are part of a "limited class of traditional exceptions to the warrant requirement that apply categorically and thus do not require an assessment of whether the policy justifications underlying the exception . . . are implicated in a particular case." *McNeely*, ___ U.S. at ___, 133 S. Ct. at 1559 n.3. The dissent is therefore mistaken that it "strains credulity to suppose" that the search-incident-to-arrest exception would apply to a future warrantless breath test case because the exception "turns on the same rationale regarding the preservation of evidence that the Supreme Court explicitly rejected in *McNeely*." The Supreme Court reaffirmed in *McNeely* that a search of a person incident to arrest is categorically justified not by a specific rationale for the preservation of evidence, but by a lawful arrest.

Based on our analysis above, the warrantless search of Bernard's breath would have been reasonable as a search incident to his valid arrest. The undisputed facts of this case establish that the police had probable cause to arrest Bernard for DWI. Indeed, Bernard does not dispute that the police validly arrested him before asking him to submit to a breathalyzer test. The breath test was a search of Bernard's person that would have been no more intrusive than the myriad of other searches of the body that we and other courts have upheld as searches incident to a valid arrest. *See, e.g.*, *Riley*, 303 Minn. at 254, 226 N.W.2d at 909. We therefore conclude that a breath test is a search of the arrestee's person and is justified by virtue of the lawful arrest itself. As a result, we hold that a warrantless breath test of Bernard would have been constitutional under the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement.[11]

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[11] The dissent argues that our holding ignores the U.S. Supreme Court's narrowing of the search-incident-to-arrest exception. The Supreme Court, however, has not been narrowing the search-incident-to-arrest exception as it applies to searches of the arrestee's person. Instead, the Court has been clarifying the exception's application to a search of the area or things within the arrestee's immediate control. *See Riley*, ___ U.S. at ___, 134 S. Ct. at 2484-85 (holding that searching the data on a cell phone was not a search incident to arrest, but recognizing a categorical exception justifying searches of an arrestee's person); *Gant*, 556 U.S. at 339 (discussing searches incident to arrest in the context of a search of an automobile).

Further, despite narrowing the scope of the exception in terms of searches other than of the defendant's body, the U.S. Supreme Court has not overruled *Robinson*, and "only the Supreme Court may overrule one of its own decisions." *State v. Brist*, 812 N.W.2d 51, 56 (Minn. 2012) (citing *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983)).

II.

We turn next to Bernard's substantive due process challenge to the test refusal statute. The due process clauses of the United States and Minnesota Constitutions "prohibit 'certain arbitrary, wrongful government actions, regardless of the fairness of the procedures used to implement them.' " *Boutin v. LaFleur*, 591 N.W.2d 711, 716 (Minn. 1999) (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)); *see also* U.S. Const. amends. V, XIV; Minn. Const. art. I, § 7. When assessing a due process challenge, the analysis we apply depends on whether the statute implicates a fundamental right. *Boutin*, 591 N.W.2d at 716. Having decided that the search of Bernard's breath would have been constitutional, we find no fundamental right at issue here, as Bernard does not have a fundamental right to refuse a constitutional search. *See Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (stating that fundamental rights for purposes of substantive due process are those rights and liberties "which are, objectively, deeply rooted in this Nation's history and tradition" and are "implicit in the concept of ordered liberty" (citations omitted) (internal quotation marks omitted)).

If a statute does not implicate a fundamental right, we assess its constitutionality using rational

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The Supreme Court has stated, "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [courts] should follow the case which directly controls . . . ." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). *Robinson*'s discussion of searches of the person incident to arrest is on point in this case. The Supreme Court has not overruled *Robinson*, and so we will follow it. Under *Robinson*, a search of Bernard's breath incident to his arrest is a permissible search by virtue of his lawful arrest.

basis review. *See State v. Behl*, 564 N.W.2d 560, 567 (Minn. 1997). To survive a due process challenge using rational basis review, the statute must not be "arbitrary or capricious." *Id.* We will uphold the statute as long as it is "a reasonable means to a permissive object." *Id.* We review the constitutionality of statutes de novo. *State v. Henning*, 666 N.W.2d 379, 382 (Minn. 2003).

The object of the Minnesota Impaired Driving Code, Minn. Stat. § 169A.01 *et seq.*, is public safety. We have recognized the "severe threat" that impaired drivers pose to the public's safety. *Heddan v. Dirkswager*, 336 N.W.2d 54, 62–63 (Minn. 1983). Indeed, 30 percent of traffic deaths in Minnesota in 2013 were alcohol-related. Minn. Dep't of Pub. Safety, *Minnesota Motor Vehicle Crash Facts 2013* 39 (2014). And we have said that "the state has a compelling interest in highway safety justifying efforts to keep impaired drivers off the road." *Bendorf v. Comm'r of Pub. Safety*, 727 N.W.2d 410, 417 (Minn. 2007) (citing *Heddan*, 336 N.W.2d at 63). Securing effective chemical tests to determine whether drivers suspected of being under the influence are in fact driving while impaired is reasonably related to the government's interest in keeping impaired drivers off the road.

Encouraging drivers to submit to such tests, through criminalizing their refusal, furthers that interest. In fact, one study concludes that alcohol concentration test refusals compromise the enforcement of drunk-driving laws. Ralph K. Jones & James L. Nichols, *Breath Test Refusals and Their Effect on DWI Prosecution* 42 (2012) (concluding that "[a]s statewide refusal rates increased, overall conviction rates . . . decreased"). And another study finds that

Minnesota's test refusal statute has led to a lower refusal rate and an increased conviction rate for alcohol-related offenses, including driving under the influence and test refusal. H.L. Ross, et al., *Causes and Consequences of Implied Consent Test Refusal*, 11 Alcohol, Drugs and Driving 57, 71–72 (1995).

In sum, it is rational to conclude that criminalizing the refusal to submit to a breath test relates to the State's ability to prosecute drunk drivers and keep Minnesota roads safe. We therefore hold that the test refusal statute is a reasonable means to a permissive object and that it passes rational basis review.

Affirmed.

DISSENT

PAGE, Justice, and STRAS, Justice (dissenting jointly).

We respectfully dissent. The court apparently wishes that we lived in a world without *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552 (2013), and one in which there are no limits to the search-incident-to-arrest doctrine. But we do not live in such a world. The Supreme Court of the United States has decided *McNeely* and, over the past several decades, has limited searches incident to arrest. Even though the court's opinion strikes a confident tone, the truth of the matter is that its decision is borne of obstinance, not law. The court today fundamentally departs from longstanding Fourth Amendment principles, and nullifies the warrant requirement in nearly every drunk-driving case.

I.

As justices of a state supreme court, we are bound to follow decisions of the Supreme Court of the

United States on questions of federal law. U.S. Const. Art. VI. Rather than carrying out its duty, the court selectively quotes from some Supreme Court decisions and ignores others to reach a decision that is at odds with Supreme Court precedent on the scope of searches incident to arrest. Two erroneous assumptions permeate the court's analysis. First, the court assumes, without support, that biological material may be taken from *inside* a person's body as part of a search incident to arrest. Second, the court assumes, again without support, that the rationales underlying the search-incident-to-arrest exception—officer safety and preventing the destruction of evidence, *see Chimel v. California*, 395 U.S. 752, 762-63 (1969)—do not apply to searches of a person. In the end, the court ultimately arrives at a decision that is as notable for its disregard of Supreme Court precedent as it is for its defective logic.

A.

To start with the court's first assumption, the Supreme Court has never implied, much less stated, that the search-incident-to-arrest exception extends to the forcible removal of substances from within a person's body.

The court relies almost exclusively on *United States v. Robinson*, 414 U.S. 218 (1973), a search-incident-to-arrest case that is not as expansive as the court claims. In approving the warrantless breath test that Bernard refused in this case, the court seizes upon *Robinson's* statement that, "in the case of a lawful custodial arrest[,] a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id.* at 235. The court then insists, contrary to authority, that the Supreme

Court has not subsequently "narrowed the [search-incident-to-arrest] exception with respect to a search of the arrestee's body." The court starts from the premise that the Supreme Court intended a "full search of the person" to be so broadly defined as to include the compelled removal of biological material from inside the body, and then effectively ignores everything the Supreme Court has said since *Robinson* about searches incident to arrest.

Although *Robinson*'s language is broad, it is not unlimited, and it does not support the invasive search at issue in this case. In *Robinson*, the police arrested the defendant for driving after his license had been revoked. 414 U.S. at 220-21. In accordance with standard procedures, an officer searched Robinson and found a cigarette package that contained heroin in Robinson's coat pocket. *Id.* at 221-23. At Robinson's trial, the trial court admitted the heroin into evidence, and Robinson was convicted, largely because of the heroin found during the search incident to his arrest. *Id.* at 223. The Supreme Court held that a search of a person incident to arrest is not limited to a protective frisk for weapons, as in *Terry v. Ohio*, 392 U.S. 1 (1968), and may extend to the preservation of evidence of the particular crime for which the arrest was made. *Id.* at 234-35. Ultimately, the Supreme Court concluded that it was the "lawful arrest" itself that provided the authority to search, and that the search conducted in *Robinson* was reasonable under the Fourth Amendment. *Id.* at 235.

In the context of this case, *Robinson* is more notable for its facts than for what it said. Despite the Supreme Court's broad language, the search in *Robinson* was unremarkable. The "full search of the per-

son" involved only a pat down and an examination of the contents of Robinson's pockets, not an invasive search to retrieve biological material from within his body. *See id.* at 222-23; *see also Illinois v. Lafayette*, 462 U.S. 640, 645 (1983) (stating that "the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street").

Any doubt about the bounds of *Robinson* vanished after *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473 (2014), when the Supreme Court confirmed that, when it refers to a search of a person incident to arrest, as in *Robinson*, it is talking about personal property—that is, evidence—found *on* a person. In *Riley*, a case involving the digital content of cell phones, the Supreme Court reviewed the history of the search-incident-to-arrest exception. *Id.* at ___, 134 S. Ct. at 2482-84. After discussing several cases, the Supreme Court turned its attention to *Robinson*. *Id.* at ___, 134 S. Ct. at 2483-84. It explained that, four years after *Robinson*, it "[had] clarified that [the search-incident-to-arrest] exception was limited to '*personal property* . . . immediately associated with the person of the arrestee.' " *Id.* at ___, 134 S. Ct. at 2484 (quoting *United States v. Chadwick*, 433 U.S. 1, 15 (1977) (emphasis added)); *see also Robinson*, 414 U.S. at 226 (an arresting officer may "search for and seize any evidence *on* the arrestee's person" (quoting *Chimel v. California*, 395 U.S. 752, 762-63 (1969)) (emphasis added)). The Supreme Court repeated its cautionary note about the proper scope of a search incident to arrest just four paragraphs later when it said that, "while *Robinson*'s categorical rule strikes the appropriate balance in the context of *physical objects*, neither of its rationales has much force with respect to digital content on cell phones." *Riley*, ___ U.S. at ___, 134 S. Ct. at 2484 (emphasis added); *see*

also id. at ___, 134 S. Ct. at 2489 ("A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom."). Given *Riley's* clarification that *Robinson* applies only to physical evidence found on a person's body—and not digital content found on cell phones—the only logical conclusion is that the removal of breath (or blood or urine) from the body to discover an arrestee's blood alcohol level is not part of a search incident to arrest.[12]

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[12] One could point to the Supreme Court's recent decision in *Maryland v. King*, ___ U.S. ___, 133 S. Ct. 1958 (2013), as support for the warrantless breath test at issue in this case. After all, in *King*, the Supreme Court upheld a warrantless search by which jail officials used a buccal swab to collect DNA from an arrestee under a Maryland statute. *Id.* at ___, 133 S. Ct. at 1980. The statute, the Maryland DNA Collection Act, required officers to collect a DNA sample from arrestees charged with serious crimes, but critically, the Maryland law did not subject the collection requirement to the discretion of officers. *Id.* at ___, 133 S. Ct. at 1970. The Supreme Court sanctioned the warrantless search in *King* as a routine booking procedure, not as a search incident to arrest. *Id.* at ___, 133 S. Ct. at 1971, 1977. *King* therefore does not permit a warrantless search, as here, when officers have discretion to conduct the search based on individualized suspicion and concerns about evidence preservation, rather than on an administrative interest in identifying the arrestee.

Likewise, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), although at least involving a breath test, is a case that arose under a different branch of Fourth Amendment doctrine. In *Skinner*, the Supreme Court upheld a warrantless breath test for railroad employees who worked in a "regulated industry" and had effectively "consent[ed] to significant restrictions in [their] freedom of movement where necessary for

The court nevertheless reads *Robinson* as authority for conducting any search of an arrestee, even one that collects material from within a person's body. In doing so, the court fails to address two flaws in its approach. First, molecules of ethanol (C2H6O) in a person's blood are not "physical objects" in the same sense as a "crumpled up cigarette package," *see Robinson*, 414. U.S. at 223, coins, *see Chimel*, 395 U.S. at 754, or a bag of cocaine, *see Arizona v. Gant*, 556 U.S. 332, 336 (2009). It seems obvious that, similar to the digital content of a cell phone, alveolar "deep-lung" air "differ[s] in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *See Riley*, ___ U.S. at ___, 134 S. Ct. at 2489.[13]

[their] employment." *See id.* at 624-25, 628. The triggering event for the breath test conducted in *Skinner* was a "major train accident," not an arrest, and its purpose was safety, not prosecution. *Id.* at 609, 621, 622 n.6. *Skinner* was, in other words, a "special needs" case, and like *King*, the Supreme Court recognized that it was departing from "the usual warrant and probable-cause requirements" applicable to law enforcement. *Id.* at 620 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987)). In this case, the State has not identified a "special need" for the warrantless breath test it sought to administer to Bernard.

[13] Even if breath can somehow be considered a "physical object" that is "personal property," any breath test that could have been performed in this case would still not qualify as a search incident to arrest because it would have been "remote in time or place from the arrest." *United States v. Chadwick*, 433 U.S. 1, 15 (1977) (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991). In fact, that is precisely what the Texas Court of Criminal Appeals, the court of last resort for criminal matters in Texas, recently recognized in the context of a blood draw. *See State v. Villarreal*, ___ S.W.3d ___, 2014 WL 6734178,

Second, the court fails to acknowledge that a search incident to arrest is limited to evidence found *on* an arrestee's body. Typically, a person taking a breath test must insert a tube into his or her mouth and then comply with the officer's instructions to blow into the tube at a specified rate until the breathalyzer has had sufficient time to analyze a sample of deep-lung air. *See, e.g.*, *California v. Trombetta*, 467 U.S. 479, 481 (1984) (describing requirements for administering the Intoxilyzer). Failure to produce an "adequate . . . sample" is punishable by up to 7 years in prison. *See* Minn. Stat. §§ 169A.20, subds. 2-3, 169A.51-52 (2014). The court does not cite a single Supreme Court case authorizing such a profound intrusion *into* a person's bodily integrity during a search incident to arrest. *Cf. Skinner*, 489 U.S. 616-17 (recognizing that testing deep-lung breath, like conducting a blood test, raises "similar concerns about bodily integrity"); *King*, ___ U.S. at ___, 133 S. Ct. at 1989 (Scalia, J., dissenting) ("I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection."). The reason is that no such case exists.

A warrantless search is unreasonable unless it falls within a specific exception to the warrant requirement. *Riley*, ___ U.S. at ___, 134 S. Ct. at 2482. Instead of acknowledging that its decision repudiates longstanding Fourth Amendment principles, the court responds by saying that the Supreme Court has never explicitly forbidden the particular type of warrantless search at issue in *this* case. Such reasoning, however, turns the warrant requirement on its

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at *15 (Tex. Crim. App. Nov. 26, 2014) (quoting *Chadwick*, 433 U.S. at 15).

head, allowing it to serve as a presumption in favor of warrantless searches rather than as a safeguard against them.

B.

The court's second assumption is equally extreme: that the rationales for the search-incident-to-arrest exception—officer safety and preventing the destruction of evidence—do not apply to searches of a person. Again, the court's assumption is in conflict with Supreme Court precedent.

In *Chimel v. California*, 395 U.S. 752 (1969), the Supreme Court considered whether an arrest of a person in his home permitted the police to search the entirety of the arrestee's three-bedroom home, including his attic and garage. The Supreme Court invalidated the search and identified the two rationales that support searches incident to arrest: protecting the safety of officers and preventing the concealment and destruction of evidence. *Id.* at 762-63. Those rationales allow an arresting officer, without a warrant, to (1) "search the person arrested in order to remove any weapons," (2) "search for and seize any evidence *on the arrestee's person* in order to prevent its concealment or destruction," and (3) search in "the area into which an arrestee might reach." *Id.* (emphasis added); *see also Riley*, ___ U.S. at ___, 134 S. Ct. at 2483 (quoting *Chimel*, 395 U.S. at 762-63). The court now contends, however, that neither rationale applies to a search for evidence on an arrestee's person, but only to searches of the area under the arrestee's immediate control.

As support, the court seizes on *Riley*'s acknowledgement of "*Robinson*'s admonition that searches of a person incident to arrest, 'while based upon the need to disarm and to discover evidence,' are reason-

able regardless of 'the probability in a particular arrest situation that weapons or evidence would in fact be found.' " ___ U.S. at ___, 134 S. Ct. at 2485 (quoting *Robinson*, 414 U.S. at 235). The court references this statement as proof that, "far from overruling or narrowing *Robinson*, the [Supreme] Court [in *Riley*] recognized again *Robinson*'s 'categorical rule' allowing a search of the person of an arrestee justified only by the custodial arrest itself . . . ."

The court misinterprets *Robinson*, and entirely ignores the remainder of *Riley*, including its holding, which "decline[d] to extend *Robinson* to searches of data on cell phones" based on the rationales from *Chimel*. ___ U.S. at ___, 134 S. Ct. at 2485. As the Supreme Court explained, *Robinson* rejected the need for "case-by-case adjudication" to determine whether the *Chimel* rationales were present in a "particular arrest situation." *Id.* at ___, ___, 134 S Ct. at 2483, 2485; *see also United States v. Chadwick*, 433 U.S. 1, 14-15 (1977) (explaining that *Robinson* eliminated the need for an arresting officer "to calculate the probability that weapons or destructible evidence may be involved" before conducting a search incident to arrest), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991). But neither *Robinson* nor *Riley* rejected the *Chimel* rationales as bookends for the circumstances under which the search-incident-to-arrest exception applies.[14] *See,*

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[14] In fact, in an opinion concurring in part and concurring in the judgment, Justice Alito wrote separately to advance a variation on the court's argument today: that "the [search-incident-to-arrest] rule is not closely linked to the need for officer safety and evidence preservation" because "these rationales fail to explain the rule's well-recognized scope." *Riley*, ___ U.S. at ___, 134 S. Ct. at 2496 (Alito, J., concurring). Whatever the merits of Justice Alito's argument, it is notable that no other member of

e.g., *Knowles v. Iowa*, 525 U.S. 113, 119 (1998) (rejecting the search-incident-to-arrest exception in the context of issuance of citations, "a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all."). After all, the Supreme Court framed the question in *Riley* as "whether application of the search incident to arrest doctrine to this particular category of effects would '*untether the rule from the justifications underlying the* Chimel *exception*.' " *Riley*, 134 S. Ct. at 2485 (emphasis added) (quoting *Arizona v. Gant*, 556 U.S. 332, 343 (2009)).

More broadly, it is clear that the court *needs* to cast aside the *Chimel* rationales to reach its decision today. The *only* justification for allowing police to conduct a warrantless breath test is the preservation of evidence due to the natural dissipation of alcohol from a person's bloodstream. In *McNeely*, however, the Supreme Court specifically rejected the proposition that the natural metabolization of alcohol constitutes a *per se* exigency justifying a warrantless blood test. ___ U.S. at ___, 133 S. Ct. at 1568. It explained that blood alcohol testing

> is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a " 'now-or-never' " situation. In contrast to, for example, circumstances in which the suspect has control over easily disposable evidence, BAC evidence from a drunk-driving suspect natural-

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the Supreme Court joined Justice Alito's concurrence, and that the majority opinion in *Riley* continued to adhere to the two rationales from *Chimel*.

> ly dissipates over time in a gradual and relatively predictable manner.

Id. at ___, 133 S. Ct. at 1561 (internal citations omitted). The Supreme Court then made clear that officers are required to get a warrant to test a suspect's blood alcohol content if they can reasonably do so under the circumstances. *Id.* at ___, 133 S. Ct. at 1561-63; *see also Riley*, ___ U.S. at ___, 134 S. Ct. at 2495 (stating that the answer to "what police must do before searching a cell phone seized incident to arrest is accordingly simple—get a warrant"). It strains credulity to suppose that, after the Supreme Court carefully examined the exigent-circumstances exception in *McNeely*, it would conclude in some future case that the search would have been justified anyway under the search-incident-to-arrest doctrine, which according to *Chimel* and *Riley* turns on the same rationale regarding the preservation of evidence that the Supreme Court explicitly rejected in *McNeely*. *See* ___ U.S. at ___, 133 S. Ct. at 1557 (noting that McNeely was under arrest when the blood test was performed); *see also State v. Villarreal*, ___ S.W.3d ___, 2014 WL 6734178, at *15 (Tex. Crim. App. Nov. 26, 2014) (holding that the search-incident-to-arrest exception "is inapplicable" to a warrantless blood draw because neither of the two *Chimel* justifications applies). In fact, by casting aside *Chimel*'s rationales and creating a novel bright-line rule, the court simply readopts a per se exigency under a different name. *See State v. Shriner*, 751 N.W.2d 538, 549 (Minn. 2008) (establishing the evanescent nature of alcohol in the bloodstream as a single-factor exigency), *abrogated by Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 1558 & n.2 (2013) (no such single-factor exigency exists).

II.

The only remaining question is whether the test-refusal statute, which requires a person to submit to a breath, blood, or urine test upon suspicion of drunk driving or face stiff criminal penalties, is constitutional. *See* Minn. Stat. §§ 169A.20; 169A.24; 169A.25; 169A.26 (2014) (making the crime of test refusal a first-, second-, or third-degree driving-while-impaired offense depending on whether an aggravating factor is present). We conclude that, in Bernard's case, it is not.

In *Camara v. Municipal Court of S.F.*, 387 U.S. 523 (1967), the Supreme Court held that a state cannot criminalize the refusal to consent to an illegal warrantless search. *Id.* at 540; *see also See v. City of Seattle*, 387 U.S. 541 (1967) (companion case). The appellant in *Camara* was charged with a misdemeanor offense when he refused to allow housing inspectors to enter his residence to conduct a search of the premises without a warrant. 387 U.S. at 525-27. The prosecution arose out of a San Francisco ordinance that allowed certain "[a]uthorized employees" of the City to "enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code." *Id.* at 526, 527 n.2. Once the Supreme Court concluded that the search was illegal, it held that the "appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection." *Id.* at 540.

There are, to be sure, instances in which it would be constitutional to apply the test-refusal statute to impose criminal penalties on suspected drunk drivers who refuse a blood, breath, or urine test. But

those instances are limited to circumstances in which the underlying search would be constitutional, such as those identified in *McNeely* when, under a totality of the circumstances, it is unreasonable for officers to obtain a warrant. *McNeely*, ___U.S.___, 133 S. Ct. at 1561. The State does not argue in this case that it was unreasonable for the officers to obtain a warrant under the totality of the circumstances. Accordingly, because the search in this case was not a valid warrantless search, and the State may not constitutionally convict persons who exercise their "constitutional right to insist that [police] obtain a warrant," *Camara*, 387 U.S. at 540, we would affirm the district court's decision to dismiss the two counts of test refusal against Bernard.

For the foregoing reasons, we respectfully dissent.

APPENDIX B

844 N.W.2d 41
Court of Appeals of Minnesota.

STATE of Minnesota, Appellant,
v.
William Robert BERNARD, Jr., Respondent.

No. A13–1245. | March 17, 2014.

Background: Defendant was charged with refusal to take breath test requested by police under implied consent law. The District Court, Dakota County, dismissed the charge, and state appealed.

The Court of Appeals, Ross, J., held that prosecution of defendant for refusal to take breath test did not violate his due process rights.

Reversed and remanded.

Lori Swanson, Attorney General, St. Paul, MN; and James C. Backstrom, Dakota County Attorney, Tori K. Stewart, Assistant County Attorney, Karen L. Wangler, Assistant County Attorney, Hastings, MN, for respondent.

Steven T. Grimshaw, Minneapolis, MN,; and Jeffrey S. Sheridan, Strandemo, Sheridan & Dulas, P.A., Eagan, MN, for appellant.

Considered and decided by SMITH, Presiding Judge; ROSS, Judge; and RODENBERG, Judge.

OPINION

William Bernard was arrested for suspected drunk driving and refused to take a breath test requested by police under the state's implied consent law. The state charged Bernard with the crime of test refusal. The district court dismissed the charge, reasoning that the Constitution prohibits the state

was decided and now address the state's appeal in light of *Brooks*.

ISSUE

Did the district court err by concluding that the state cannot criminalize Bernard's refusal to submit to a warrantless breath test because there was no constitutionally permissible basis to conduct a warrantless search?

ANALYSIS

When the state appeals a pretrial order dismissing criminal charges, it must show clearly and unequivocally "that the district court erred and that the error, unless reversed, will have a critical impact on the outcome of the prosecution." *State v. Gradishar*, 765 N.W.2d 901, 902 (Minn.App.2009) (quotation omitted). We can exercise jurisdiction and hear the appeal only if the state satisfies the critical-impact test. *State v. Baxter*, 686 N.W.2d 846, 850 (Minn.App.2004). Our jurisdiction is not in doubt here. A district court order dismissing criminal charges has a critical impact on the prosecution. *Gradishar*, 765 N.W.2d at 902. The district court order effectively ended Bernard's prosecution, so the threshold jurisdictional requirement is met.

The state argues that the district court erroneously dismissed the charges. The challenge raises a question of law, so we may review the undisputed facts independently and decide whether the district court erred by dismissing the charges. *State v. Harris*, 590 N.W.2d 90, 98 (Minn.1999). The district court's decision hinged on whether police could search Bernard. The fulcrum is reasonableness. The federal and state constitutions protect citizens against only unreasonable searches and seizures. U.S. Const. amend. IV; *44 Minn. Const. art. 1, § 10.

A compelled breath test is a search. *Skinner v. Ry. Labor Execs.' Ass'n,* 489 U.S. 602, 616–17, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639 (1989).

Bernard's two counts of felony test refusal consist of "refus[ing] to submit to a chemical test of the person's blood, breath, or urine." Minn.Stat. § 169A.20, subd. 2 (2012). The statute criminalizes refusal to submit to testing authorized under the implied consent law, which provides that anyone who drives a vehicle and is suspected of being under the influence of alcohol or other drugs has impliedly consented to a blood, breath, or urine test for alcohol. Minn.Stat. § 169A.51, subd. 1(a) (2012). We have interpreted section 169A.20, subdivision 2 as criminalizing refusals to submit to searches that are constitutionally reasonable. *See State v. Wiseman,* 816 N.W.2d 689, 694–95 (Minn.App.2012), *cert. denied,* – U.S. ——, 133 S.Ct. 1585, 185 L.Ed.2d 578 (2013). We reasoned that the state may therefore criminalize a person's refusal to submit to a breath test when it obtains a search warrant or demonstrates that an exception to the warrant requirement applies. *Id.* Consent is one established exception, *State v. Othoudt,* 482 N.W.2d 218, 222 (Minn.1992), and search incident to arrest is another, *Arizona v. Gant,* 556 U.S. 332, 338, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009). The common exception in chemical testing has been exigent circumstances. *See, e.g., State v. Netland,* 762 N.W.2d 202 (Minn.2009); *Wiseman,* 816 N.W.2d 689. This exception authorizes a warrantless search if police have probable cause that the suspect committed a crime and exigent circumstances necessitate an immediate search. *Kentucky v. King,* —— U.S. ——, 131 S.Ct. 1849, 1856, 179 L.Ed.2d 865 (2011).

Our state supreme court held in *State v. Shriner* that a warrantless blood draw was constitutionally reasonable because the natural dissipation of alcohol in the blood constituted a per se exigent circumstance. 751 N.W.2d 538, 549–50 (Minn.2008), *abrogated by McNeely*, 133 S.Ct. 1552. It affirmed this approach in *State v. Netland*, 762 N.W.2d at 214. We later observed that the term "implied consent" is a misnomer because the statute criminalizes "refusal to '*submit* to a chemical test,' not ... refusal to *consent* to a chemical test." *Wiseman*, 816 N.W.2d at 693 (first emphasis added) (quoting Minn.Stat. § 169A.20, subd. 2 (2008)). Following *Shriner*, we explained that the natural dissipation of alcohol in the blood justified warrantless testing of suspected drunk drivers. *Id.* at 694. Because these searches were constitutionally reasonable, police did not need consent to conduct them and we saw no constitutional right to refuse to submit. *Id.* at 695. We therefore affirmed the criminal penalties as constitutional. *Id.* at 696.

Bernard takes the position that the Supreme Court relandscaped in *McNeely* by holding that the dissipation of alcohol in the bloodstream did *not* constitute a per se exigent circumstance permitting police to draw blood for testing against the will of a suspected drunk driver. *See* 133 S.Ct. at 1567–68. Under *McNeely*, police who draw blood against the driver's will must demonstrate that, based on the totality of the circumstances, a warrantless search is justified. *Id.* at 1568. Under Bernard's theory, *McNeely*, as applied through *Wiseman*, bars criminal charges for test refusal because it eliminates what had been a per se exigent circumstance that justifies both executing a search and criminalizing a refusal.

The state supreme court recently considered *McNeely* 's impact on our implied consent law in *State v. Brooks,* 838 N.W.2d 563, 567 (Minn.2013), *pet. for cert. filed* (U.S. Feb. 24, 2014). But *Brooks* does not answer our question because, unlike here, in that case the defendant ultimately submitted to testing and the court held that, under the totality of the circumstances, he freely and voluntarily consented to the chemical tests. *Id.* at 572. Because Bernard never submitted to a test, *Brooks*'s holding is inapposite.

We focus on *Wiseman,* which we do not read as narrowly as Bernard implicitly asks us to. As we explained in *Wiseman,* under the implied consent statute "the legislature has criminalized a suspect's refusal to comply with a police officer's lawful search." 816 N.W.2d at 696. In that case, because we assumed the existence of exigent circumstances that would have justified the officer to conduct a search even without the suspected drunk driver's consent, we held that he "has not demonstrated the existence of a fundamental right, recognized under either federal or Minnesota law, to passively or nonviolently refuse to submit to a constitutionally reasonable police search." *Id.* at 695. We therefore saw no violation of Wiseman's substantive due process rights by the state's authority to prosecute Wiseman for refusing to submit to a breath test. *Id.* at 696.

Bernard would have us hold that because exigent circumstances did not exist when the officer asked him to submit to a chemical test (so that the Fourth Amendment would have precluded the officer from forcing a hypothetical warrantless test against Bernard's will), prosecuting him for refusing to consent to the test violates his due process rights. But we think the broader proposition that we summarized in

Wiseman also applies here. We explained there that "[t]he imposition of criminal penalties for refusing to submit to a constitutionally reasonable police search, namely, a chemical test of ... breath ... supported by probable cause, is a reasonable means to facilitate a permissible state objective." *Id.* We do not here consider the constitutionality of a hypothetical warrantless search in the absence of consent as we did in *Wiseman* when we rejected Wiseman's constitutional argument. Assuming under these facts that, after *McNeely*, the officer would not have been justified to conduct a warrantless search (a proposition the state disputes), we can consider whether the officer's request was appropriate on other grounds. We hold that it was.

Because the officer indisputably had probable cause to believe that Bernard was driving while impaired (he was identified by witnesses as the driver, he was holding the truck keys, and his wardrobe, instability, and odor indicated that he was intoxicated), the officer also indisputably had the option to obtain a test of Bernard's blood by search warrant. *See* U.S. Const. amend. IV. (requiring probable cause for search warrants); Minn.Stat. § 626.11(a) (2012) ("If the judge is satisfied ... that there is probable cause ... the judge must issue a signed search warrant...."); Minn.Stat. § 169A.20, subd. 1 ("It is a crime for any person to drive ... any motor vehicle ... when ... the person is under the influence of alcohol."); *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983) (holding that probable cause to search exists when, under the circumstances, there is a "fair probability that contraband or evidence of a crime will be found in a particular place"). So at the time the officer asked Bernard whether he would submit to a breath test, the officer could have just as

lawfully asked an independent jurist to issue a search warrant to test Bernard's blood. Like the hypothetical warrantless test available to the officer in *Wiseman*, a hypothetical warrant-sponsored test is also a "constitutionally reasonable police search." In other words, the officer had a lawful option to require Bernard to submit to a chemical test, based on a search warrant, and he instead gave Bernard the choice to voluntarily submit to warrantless testing. That the officer chose one approach (the authority to make the request under the implied consent statute) rather than another (the authority to obtain a warrant under the impaired driving statute) does not make penalizing Bernard's decision unconstitutional because the consequent testing under either approach would have been constitutionally reasonable. We recognize that the officer did not actually possess a search warrant at the time of his request, but the constitutional and statutory grounds for a warrant plainly existed before the request. Just as we deemed significant the fact that the officer in *Wiseman* could have lawfully taken a nonconsensual approach theoretically available to him, we deem it significant that the officer here also could have lawfully taken a nonconsensual approach. The officers in both cases instead asked the suspected drunk driver to voluntarily submit to testing. We recognize that the alternative to obtaining a chemical test here, like the *Wiseman* hypothetical alternative, is purely theoretical, because the implied consent law admonishes police that "a test must not be given" if the driver refuses. Minn.Stat. § 169A.52, subd. 1 (2012). But the question in both settings is whether the requesting officer had a *constitutionally* viable alternative. We hold that Bernard's prosecution did not implicate any

fundamental due process rights, just as we held as to Wiseman's prosecution.

Although it does not drive our analysis, we add that this holding affords a significant practical advantage over the holding that Bernard urges. Prohibiting the state from charging a driver for test refusal on the notion that the state's authority depends on whether, in each particular case, exigent circumstances *would have* justified the requesting officer to conduct a warrantless search at the time she made the request adds prosecutorial and judicial complications without providing any constitutionally significant benefit to defendants. The new constitutional rule would put the myriad test-refusal factual scenarios on a spectrum depending on various circumstances surrounding the test request, especially after *McNeely*. On one end, exigent circumstances would have clearly justified a hypothetical warrantless search at the time of the refused test request, so the refusal to test could certainly be prosecuted. On the other end, exigent circumstances would clearly not have justified a warrantless search, so the refusal could certainly *not* be prosecuted. And in the vast majority of cases in the middle, one could reasonably argue either way as to whether the temporal and logistical and practical circumstances supported a hypothetical warrantless search, so another round of collateral litigation would become necessary. We would probably call it a *Bernard* hearing. Anticipating the hearing, arresting officers would have the incentive to delay asking for the chemical test until near the end of the two-hour statutory testing period, *see* Minn.Stat. § 169A.20, subd. 1(5), making a finding of exigency more likely. Some offenders could be prosecuted and others not, based on details that differ in constitutionally insignificant ways. (For exam-

ple, an officer has a mechanical problem on the way to jail with her intoxicated arrestee while another officer does not; the delayed officer can make an argument that exigent circumstances existed at the time of the test refusal while the other cannot.)

The state offers two alternative theories to contend that the officer could have conducted a *warrantless* chemical test here. It maintains that the search-incident-to-arrest exception applies and that breath tests garner less Fourth Amendment protection than blood tests. Although not necessary to our decision, we address both briefly. We observe that, despite some apparent confusion in the caselaw, the Supreme Court in *Schmerber v. California* initially analyzed forced blood draws as searches incident to arrest. 384 U.S. 757, 768–71, 86 S.Ct. 1826, 1834–36, 16 L.Ed.2d 908 (1966). This analytical framework facially seems to support the state's argument, but we add that the *Schmerber* Court, like the *McNeely* Court, saw exigency as a key component of a constitutionally appropriate warrantless blood test. *Compare id.* at 769–72, 86 S.Ct. at 1835–36 (holding that passage of time created exigencies that superseded suspect's privacy interest in avoiding a warrantless blood draw), *with McNeely*, 133 S.Ct. at 1568 (holding that evanescent nature of alcohol in the body does not, by itself, establish a per se exigency justifying warrantless blood draws). So treating the hypothetical warrantless test as a search incident to arrest cannot be sufficient without also satisfying the exigency requirement. Regarding the notion that breath tests are less protected than blood tests, the *Schmerber* Court referred to a blood draw as being only moderately intrusive ("commonplace in these days of periodic physical examinations," ... "the quantity of blood extracted is minimal," ... "for most

people the procedure involves virtually no risk, trauma, or pain"), 384 U.S. at 771, 86 S.Ct. at 1836, while the *McNeely* Court described a blood draw in more intrusive terms ("a compelled physical intrusion beneath McNeely's skin and into his veins," ... "an invasion of bodily integrity"), 133 S.Ct. at 1558. But the Supreme Court in both cases treated the existence or lack of exigent circumstances as the critical factor bearing on whether a compelled warrantless blood test could survive constitutional scrutiny; the degree of intrusiveness clearly was not the dispositive issue. The state's arguments on these points are not compelling, but in light of our holding, we do not decide them.

We similarly do not reach the state's argument that the district court applied the wrong test when it relied on the factors announced in *Dorman v. United States*, 435 F.2d 385, 392–93 (D.C.Cir.1970), to analyze the totality of the circumstances, or Bernard's argument that the implied consent law is unconstitutional because it conditions the exercise of the privilege of driving on the driver surrendering his constitutional right to be free of unreasonable searches and seizures.

DECISION

The state is not constitutionally precluded from criminalizing a suspected drunk driver's refusal to submit to a chemical test under circumstances in which the requesting officer had grounds to have obtained a constitutionally reasonable nonconsensual chemical test by securing and executing a warrant requiring the driver to submit to testing.

Reversed and remanded.

APPENDIX C

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT

File No. 19ha-Cr-12-2741
State Of Minnesota,
Plaintiff,
Vs.
William Robert Bernard,
Defendant.

ORDER

The above-entitled matter came before the Honorable Jerome B. Abrams, Judge of District Court, on June 21, 2013, at the Dakota County Courthouse, Hastings, Minnesota. Karen Wangler, Assistant County Attorney, appeared as counsel for and on behalf of the State of Minnesota. Steven Grimshaw, Attorney at Law, appeared as counsel for and on behalf of the Defendant.

The parties agreed to submit the matter on a limited record consisting of the Court file, the Defendant's motion to dismiss and accompanying memorandum, and a reply brief from the State.[1] A deadline of June 28, 2013 was set for submission of the State's brief and the matter was taken under advisement at that time.

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[1]The Court expressly invited the State to comment on the impact of *State v. Wiseman*, 816 N.W.2d 689 (Minn. App. 2012) to this case in light of the recent ruling in *Missouri v. McNeely*, 569 U.S. ___,133 S. Ct. 1552 (2013). No such comment was made.

Based upon the proceedings, this Court makes the following:

ORDER

1. This matter is dismissed because there is no evidence the Defendant committed the crime of test refusal, as interpreted by the Minnesota Court of Appeals in *State v. Wiseman*, 816 N.W.2d 689 (Minn. App. 2012), *pet. for rev. den.* (Minn. Sept. 25, 2012), *pet. for cert. den.* 133 S. Ct. 1585 (Mar. 18, 2013), alleged in counts one and two of the Complaint.

2. The Defendant's request to have Minnesota Statute § 169A.20, subdivision 2 declared unconstitutional is denied.

3. The attached memorandum of law sets for the Court's reasoning for this decision and is incorporated herein by reference.

Dated: June 28, 2013

BY THE COURT:

_/s/_____
Jerome B. Abrams
Judge of District Court

MEMORANDUM

This matter came before the Court on the Defendant's motion to dismiss the two "test refusal" charges brought against him; separate violations of Minnesota Statute §§ 169A.20, subdivision 2; 169A.24, subdivisions 1(1)-(2) and 2; and 169A.276, subdivision 1(a). The Defendant argues the "Doctrine of Unconstitutional Conditions" renders Minnesota Statute § 169A.20, subdivision 2 unconstitutional in light of the holding in *Missouri v. McNeely*, 569 U.S., 133 S. Ct. 1552 (2013) (hereinafter referred to as "*McNeely*"). The State disagrees with the Defendant's position and argues *McNeely* does not apply or affect this case because the facts are different.

The Complaint recites the facts of this case. On August 5, 2012 at approximately 7:00 p.m. peace officers were dispatched to a boat launch in South St. Paul, Minnesota. Upon arriving at the scene, a witness directed officers to "three drunk males [fl] attempting to pull a boat from the water [when] their truck got stuck." At least two witnesses identified the Defendant, by his lack of pants, as the driver of the truck. Officers observed a strong odor of alcoholic beverage coming from the group of three men and specifically observed the odor of alcoholic beverage from the Defendant's breath. In addition, officers observed the Defendant had bloodshot and watery eyes. The Defendant admitted to drinking but adamantly insisted he was not the driver of the vehicle. However, the officers obtained the keys for the vehicle from the Defendant.

Officers asked the Defendant to perform field sobriety tests but he refused. The Defendant was then placed under arrest and transported to the South St. Paul Police Department where he was read the Min-

nesota Implied Consent Advisory. Officers asked the Defendant to take a breath test. The Defendant refused. No warrant was obtained authorizing a breath test of the Defendant on August 5, 2012. Based upon the Defendant's refusal to provide breath samples for a breath test and a criminal history showing prior driving while intoxicated convictions, the Defendant was charged as described above. The Defendant was not charged with operating or being in physical control of a motor vehicle while under the influence of alcohol. *See* Minn. Stat. § 169A.20, subd. 1.

Wiseman

The Defendant challenges the constitutionality of Minnesota Statute § 169A.20, subdivision 2; making it a crime to refuse to submit to a test of blood, breath, or urine for alcohol concentration. The Minnesota Court of Appeals addressed a challenge to the constitutionality section 169A.20, subdivision 2 on substantive due process grounds in *State v. Wiseman*. 816 N.W.2d 689 (Minn. App. July 16, 2012), *rev. denied* (Minn. Sept. 25, 2012), *cert. denied* 133 S. Ct. 1585 (Mar. 18, 2013). The specific challenge in *Wiseman* was whether the Defendant had a "fundamental right to passively or nonviolently 'refuse to consent to a warrantless' search and thereby refuse to produce" a blood or urine sample for alcohol concentration testing. *Id.* at 693. The Court noted Minnesota statutes are presumed constitutional and will only "strike down a statute as unconstitutional only if absolutely necessary." *Id.* at 692 (*citing State v. Melde*, 725 N.W.2d 99, 102 (Minn. 2006)).

The Court started its analysis by determining what level of scrutiny should be applied to review the constitutionality of the statute. *Id.* at 692-3. The Court explained that review of a law implicating a

fundamental right would be subject to strict scrutiny; "upheld only if the state demonstrates that the law is necessary to serve a compelling state interest and narrowly tailored to serve that interest." *Id.* at 692-3 (*citing In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999) and *Essling v. Markman*, 335 N.W.2d 237, 239 (Minn. 1983)). For "legislative enactment[s that] do[] not implicate a fundamental right, substantive due process requires only that the law is not arbitrary or capricious or that it reflects a reasonable means to a permissible state objective." *Id.* at 693 (*citing State v. Behl*, 564 N.W.2d 560, 567 (Minn. 1997)). Fundamental rights include those set forth in the "Bill of Rights." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing "long line of cases" where "liberty" guaranteed by Due Process Clause includes rights "in addition to the specific freedoms protected by the Bill of Rights"), *cited by Wiseman*, 816 N.W.2d at 693. The constitutional guarantee of freedom from unreasonable searches and seizures is therefore a fundamental right. *See, e.g., California v. Carney*, 471 U.S. 386, 390 (1985) (describing Fourth Amendment protection as fundamental right); *Ker v. State of Cal.*, 374 U.S. 23, 32-3 (1963) (stating "Fourth Amendment's protection from unreasonable searches and seizures . . . has been declared to be as of the very essence of constitutional liberty the guaranty of which is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen . . .") (internal quotations omitted).

Wiseman's constitutional challenge, however, did "not implicate a specific constitutional provision [because he] acknowledge[d] that the police were justified in collecting a sample for chemical testing under the exigent-circumstances exception to the warrant requirement . . . ," *Wiseman*, 816 N.W.2d at 693 (*cit-*

ing Schmerber v. California, 384 U.S. 757, 772, 86 S.Ct. 1826, 1836, 16 L.Ed.2d 908 (1966) and *State v. Netland*, 762 N.W.2d 202, 212-13 (Minn. 2009)). As a consequence, the Court determined Wiseman had not demonstrated implication of a fundamental right and applied a rational basis test. *Id.* at 695. In reaching this decision, the Court of Appeals observed that Minnesota Statute § 169A.20, subdivision 2 only criminalized "refusal to submit to a chemical test,' not a person's refusal to *consent* to a chemical test." *Id.* at 693 (emphasis in original). The Court used this distinction to distinguish other cases[2] recognizing a "fundamental right" in the form of a "'liberty interest against unreasonable prying into [] personal affairs.'" *Id*, at 695. Specifically, the police had lawful authority to conduct a search without a warrant "because it f[ell] within the exigent-circumstances exception to the warrant requirement." *Id.* at 695 (*quoting State v. George*, 557 N.W.2d 575, 581 (Minn. 1997) and *Netland*, 762 N.W.2d at 212-3, respectively). Due to the presence of the exigent circumstances exception, "neither a warrant nor consent are necessary to administer a constitutionally reasonable chemical test supported by probable cause [and the Court's] analysis turn[ed] on whether there exists a fundamental right to passively or nonviolently refuse to submit to a constitutionally reasonable police search." *Id.* at 694.

With this in mind, the Court of Appeals found Minnesota's test refusal statute constitutional. Id. at

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[2] The cases cited by the Court of Appeals include *State.v. Larson*, 788 N.W.2d 25, 32-3 (Minn. 2010), *State v. George*, 557 N.W.2d 575, 581 (Minn. 1997), and *State v. Dezso*, 512 N.W.2d 877, 880-1 (Minn. 1994).

696. "Impaired drivers pose a severe threat to the health and safety of motorists in Minnesota, and the state has a compelling interest in highway safety that justifies efforts to keep impaired drivers off the road." *Id.* at 695 (*citing Bendorf v. Comm'r of Pub. Safety*, 727 N.W.2d 410, 416-17 (Minn. 2007)). The state therefore "has a legitimate, time-sensitive interest in obtaining a blood, breath, or urine sample for chemical testing from an individual when the police have probable cause to believe that the individual committed criminal vehicular operation." *Id. (citing Netland*, 762 N.W.2d at 212-13 and *State v. Shriner*, 751 N.W.2d 538, 549-50 (Minn. 2008)). The legislature has the "exclusive province to define by statute what acts constitute criminal conduct" *Id.* at 696 (*citing Behl*, 564 N.W.2d at 568). Criminalizing refusal to "cooperate with [an officer's] constitutionally reasonable search" "constitutes a reasonable means to achieve a permissible state objective and does not violate [a driver's] right to substantive due process." *Id.*

To reach the holding of *Wiseman*, the Court narrowly construed Minnesota Statute § 169A.20, subdivision 2 as "criminaliz[ing] a suspect's refusal to comply with a police officer's ***lawful*** search." *Id.* at 696 (emphasis added).[3] The search[4] of Wiseman was

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[3] The State cited *South Dakota v. Neville*, 459 U.S. 553, 560 (1982) for the proposition that "the penalty of taking away a driver's license for refusing to take a blood alcohol test was unquestionably legitimate." Notwithstanding that the issue in this case is not revocation or suspension of the Defendant's license as it was in *Neville*, but probable cause to support a criminal charge, the United States Supreme Court actually held in *Neville* "that that a refusal to take a blood-alcohol test, after a police officer has *lawfully* requested it, is not an act coerced by the officer . . . . " *Id.* at 564 (emphasis added).

admittedly lawful because under the Minnesota Supreme Court's holding in *Netland* because "the evanescent nature of the evidence creates the conditions that justify a warrantless search" under the exigent circumstances exception to the warrant requirement found in the United States and Minnesota Constitutions. 762 N.W.2d at 213, *cited by Wiseman*, 816 N.W.2d at 693. The United States Supreme Court, however, has rejected the categorical conclusion that "the natural dissipation of alcohol in the blood may support a finding of exigency." *McNeely*, 569 U.S. at___, 133 S. Ct. at 1563. Each individual case must be reviewed for exigency in light of the total circumstances. *Id.* It is within this framework of constitutional and statutory interpretation that this Court must decide this case.

Defendant's Challenge to Test Refusal

The Minnesota and United States Constitutions prohibit unreasonable searches and seizures and afford the fundamental right to be free from the same. U.S. Const. amend. IV; Minn. Const., art. 1, § 10. Blood, breath, and urine alcohol concentration tests are all "searches." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-7 (1989) (discussing prior holdings that blood was a search and holding breath and urine are searches), *cited by McNeely*, 569 U.S. at ___, 133 S. Ct. at 1558 (*citing Schmerber v. California*, 384 U.S. 757, 758, 770 (1966)) and *by State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009) (holding breath sample a search). "It is well settled under the Fourth and Fourteenth Amendments to the United States Constitution that a search con-

[4] Wiseman was asked to submit to a blood or urine alcohol concentration test based upon probable cause of driving under the influence of alcohol.

ducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well delineated exceptions." *State v. Hanley*, 363 N.W.2d 735, 738 (Minn. 1985) (*quoting Katz v. United States*, 389 U.S. 347, 357 (1967); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971)). Consent is such an exception. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973), *cited by State v. Hanley*, 363 N.W.2d 735, 738 (Minn. 1985); *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992). As the State notes in this case, the Defendant refused to consent to provide a sample of his breath. Exigent circumstances are another such exception to the warrant requirement. *McNeely*, 569 U.S. at __ 133 S. Ct. at 1558 (*discussing Schmerber*, 384 U.S. at 758, 770 and *citing Kentucky v. King*, 563 U.S. ___, ___, 131 S.Ct. 1849, 1856 (2011)). No other exceptions have been identified as being present in this case.

Under the interpretation of Minnesota Statute § 169A.20, subdivision 2 set forth in *Wiseman*, refusal to provide the requested sample for alcohol concentration analysis is only criminalized if the requesting officer has a lawful basis to conduct the search. The exigent circumstances exception is the only identified basis for justifying the request for a breath test in this case. While the Minnesota Supreme Court previously held that single factor exigent circumstances justified a warrantless search when an officer had probable cause to believe a suspect was in possession of a motor vehicle while under the influence of alcohol, the United States Supreme Court has rejected the use of single factor exigency to justify such warrantless searches. *McNeely*, 569 U.S. at ___, 133 S. Ct. at 1557-8, 1558 n. 2, & 1560-3, *abrogating State v. Netland*, 762 N.W.2d 202, 212-4 (Minn. 2009) (*cit-*

ing State v. Shriner, 751 N.W.2d 538, 541, 548-50 (Minn. 2008). The United States Supreme Court specifically held that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *Id.* at __, 133 S. Ct. at 1563. The Court declined to provide further guidance on what "relevant factors [] can be taken into account in determining the reasonableness of acting without a warrant" as part of its decision in *McNeely*. *Cf. id.* at __, 133 S. Ct. at 1568, 1569 (J. Kennedy concurring) *with* 1573-4 (C.J. Roberts dissenting), 1577-8 (J. Thomas dissenting).

The totality of the circumstances of each case may provide the exigency that justifies conducting a search without a warrant. *McNeely*, 569 U.S. at __, 133 S. Ct. at 1559-60; *State v. Gray*, 456 N.W.2d 251, 256 (Minn. 1990). *See also Schmerber*, 384 U.S. at 758-9, 770 (applying totality of circumstances approach to alcohol concentration blood test over driver's objection following accident). In the absence of further guidance from the United States Supreme Court, the Minnesota Supreme Court uses the "*Dorman* analysis[] with the understanding that the *Dorman* factors are part of a flexible approach that encompasses all relevant circumstances." *State v. Olson*, 436 N.W.2d 92, 96-7 (Minn. 1989) (*referring to Dorman v. United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970)), *aff'd Minnesota v. Olson*, 495 U.S. 91 (1990). *See also McNeely*, 569 U.S. at __, 133 S. Ct. at 1568, 1569 (J. Kennedy concurring) (declining to provide further guidance); *Welsh v. Wisconsin*, 466 U.S. 740, 751-3 (1984) (discussing and adopting *Dorman* gravity of offense factor but not adopting and expressly refusing to adopt all factors); *Gray*, 456 N.W.2d at 256 (stating "[t]he U.S. Supreme

Court has not adopted a definite test for determining when exigent circumstances exist"). The *Dorman* factors are:

> (a) whether the offense is a grave offense, particularly a crime of violence;
>
> (b) whether the suspect is reasonably believed to be armed;
>
> (c) whether the showing of probable cause connecting the defendant to the offense is more than minimal;
>
> (d) whether the police have strong reason to believe that the suspect is in the premise being entered; and
>
> (e) whether there is a likelihood that the suspect will escape if not swiftly apprehended.

Olson, 438 N.W.2d at 97 n. 1 *(citing Dorman*, 435 F.2d at 392-3). *See also Gray*, 456 N.W.2d at 256 (flexibly applying Dorman factors in light of totality of the circumstances and including sixth factor of peaceable entry), *cited by In re B.R.K.*, 658 N.W.2d 565, 579 (Minn. 2003) (holding underage drinking not a grave offense); *State v. Lohnes*, 344 N.W.2d 605, 610-1 (Minn. 1984) (same), *cited by State v. Storvick*, 428 N.W.2d 55, 58-9 (Minn. 1988). The Minnesota Court of Appeals has considered "a defendant's capability of destroying evidence" a factor to be considered as part of the totality of the circumstances analysis. *State v. Lussier*, 770 N.W.2d 581, 588 (Minn. App. 2009) (*citing Loftus v. State*, 357 N.W.2d 419, 421 (Minn. App. 1984)). *See also McNeely*, 569 U.S. at ___, 133 S. Ct. at 1563 (holding "natural dissipation of alcohol in the blood may support finding of exigency [but] does not do so categori-

cally"). "The state has the burden of showing the existence of exigent circumstances." *Gray*, 456 N.W.2d at 256 (*citing Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984)).

The totality of the circumstances in this case does not establish an exigency separate from that prohibited by the United States Supreme Court in *McNeely*. Being in possession of a motor vehicle while under the influence of alcohol is a grave offense but not as serious as murder or vehicular homicide. Officers at the scene had adequate probable cause to place the Defendant under arrest for being in possession of a motor vehicle while under the influence of alcohol and the officers did in fact place the Defendant under arrest. As a consequence, there was no reason to believe the Defendant would become "armed" by getting back into the vehicle and posing a risk to himself or others. There was also no reason to believe the Defendant would flee, or would otherwise become unreachable. The officers were presented with a situation where the Defendant was naturally metabolizing the alcohol in his blood but there was no other reason to believe an emergency was taking place. Pursuant to *McNeely*, the United States Supreme Court requires something more than this "natural dissipation of alcohol in the blood" to establish an exigency justifying a warrantless search. The State has failed set forth any additional facts which would demonstrate an emergency existed in this case.

The officers in this case lacked a warrant or some other lawful basis to "search" the Defendant through collection of a blood, breath, or urine sample. As a consequence, there was no ***lawful*** basis to request the Defendant submit to such testing. The Minnesota

Court of Appeals' narrow reading in *Wiseman* of what is criminalized by Minnesota Statute § 169A.20, subdivision 2 does not include an officer's request for an individual to submit to an alcohol concentration test of a blood, breath, or urine sample unless the request is premised upon a ***lawful*** basis. Because no warrant was obtained and none of the recognized exceptions to the warrant requirement apply, no lawful basis exists in this case to request submission to a chemical test. The Defendant's action of refusing to submit to the requested breath test therefore does not fall within the scope of activity criminalized by Minnesota Statute § 169A.20 and the charges must be dismissed. Any other conclusion would render Minnesota Statute § 169A.20 unconstitutional because it would allow the government to conduct "an invasion of bodily integrity [that] implicates an individual's 'most personal and deep-rooted expectations of privacy'" without a lawful basis to request submission to the search. *McNeely*, 569 U.S. at ___, 133 S. Ct. at 1558 (*citing Winston v. Lee*, 470 U.S. 753, 760 (1985) and *Skinner*, 489 U.S. at 616. It would be tantamount to criminalizing an individual's assertion of the right afforded to them by the Fourth Amendment of the United States Constitution. This Court is obligated to construe the legislative intent expressed in Minnesota statutes in a manner that renders them constitutional and is further obligated to uphold the protections of both the United States and Minnesota Constitutions as set forth by the United States Supreme Court and Minnesota Appellate Courts. The opinions reached in this matter do both.

Unconstitutional Conditions Doctrine

"The unconstitutional conditions doctrine originated in *Frost v. R.R. Comm'n of Cal.*, [271 U.S. 583, 592 (1926)] when the Supreme Court discussed the rights of foreign corporations to conduct business across state lines without heavy regulatory burdens that would effectively preclude commerce. *Netland*, 762 N.W.2d at 211. The United States Supreme Court stated in *Frost* that:

> the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

271 U.S. at 593-4. "Principally, the unconstitutional conditions doctrine reflects a limit on the state's ability to coerce waiver of a constitutional right where the state may not impose on that right directly." *Netland*, 762 N.W.2d at 211 (citation omitted). "[T]oilo invoke this 'unconstitutional conditions' doctrine, [a party] must first show the statute in question in fact denies them a benefit they could otherwise obtain by giving up their [constitutional] rights." *Council of Independent Tobacco Manufacturers of America, Carolina Tobacco Co., Winner Tobacco Wholesale, Inc. v. State*, 713 N.W.2d 300, 306

(Minn. 2006) (*citing Perry v. Sindermann*, 408 U.S. 593, 598 (1972)). Therefore, the Defendant "must establish that the criminal test-refusal statute authorizes an unconstitutional search." *Netland*, 762 N.W.2d at 212. The Defendant is unable to make this showing because the Minnesota Court of Appeals, in *Wiseman*, narrowly construed Minnesota Statute § 169A.20, subdivision 2 to only criminalize refusal to submit to a test in the face of a ***lawful*** request; one within the confines of the Fourth Amendment. The Defendant's request to have Minnesota Statute § 169A.20, subdivision 2 declared unconstitutional due to the "unconstitutional conditions doctrine" is therefore denied.

APPENDIX D

STATE OF MINNESOTA
IN SUPREME COURT
A13-1245

State of Minnesota,
Respondent,
vs.
William Robert Bernard, Jr.,
Appellant.

ORDER

Appellant William Robert Bernard, Jr. filed a petition for rehearing, arguing the court failed to properly consider *Schmerber v. California,* 384 U.S. 757 (1966), and *Missouri v. McNeely,* _____ U.S. ____, 133 S. Ct. 1552 (2013), in reaching its decision in this case. While members of the court disagree about the effect of these cases, the court considered them in reaching its decision.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that appellant's petition for rehearing is denied.

Dated: March 16, 2015

BY THE COURT:

/s/

Lorie S. Gildea
Chief Justice

No. 14-1470

In the Supreme Court of the United States

William Robert Bernard, Jr.,
Petitioner,

v.

State of Minnesota,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
FROM THE SUPREME COURT OF MINNESOTA

BRIEF IN OPPOSITION

JAMES C. BACKSTROM
Dakota County Attorney

PHILLIP D. PROKOPOWICZ
Counsel of Record
Chief Deputy County Attorney
Dakota County Judicial Center
1560 Highway 55
Hastings, Minnesota 55033
(651) 438-4438
phil.prokopowicz@co.dakota.mn.us

Attorneys for Respondent

2015 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

QUESTION PRESENTED FOR REVIEW

Respondent objects to Petitioner's question presented as it fails to accurately reflect the scope and application of the Minnesota Supreme Court's decision in *Bernard*.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW.....i

TABLE OF AUTHORITIES.....iii

JURISDICTION.....1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE AND FACTS.....1

REASONS FOR DENYING THE PETITION.....3

CONCLUSION.....9

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT DECISIONS

Arizona v. Gant, 556 U.S. 332 (2009).....8

Maryland v. King, 133 S. Ct. 1958 (2013).....7

Missouri v. McNeely, 133 S. Ct. 1552 (2013).....5

United States v. Robinson, 414 U.S. 218 (1973).....6, 7

FEDERAL COURT DECISIONS

Burnett v. Municipality of Anchorage, 806 F.2d 1447 (9th Cir. 1986).....8

Byrd v. Clark, 783 F.2d 1002 (11th Cir. 1986).....8

Hoover v. Ohio, No. 13-3330 (6th Cir. Dec. 4, 2013)...5

United States v. Muir, No. 8:13-mj-03005-TMD (D. Md May 7, 2015).....5

United States v. Reid, 929 F.2d 990 (4th Cir. 1991).....8

MINNESOTA DECISIONS

State v. Bernard, 859 N.W.2d 762 (Minn. 2015).....*passim*

OTHER STATE DECISIONS

Commonwealth, Dep't of Transp. v. McFarren, 514 Pa. 411, 525 A.2d 1185 (1987).....9

Hawai'i v. Yong Shik Won,
134 Hawai'i 59 (2014).....5

Missouri v. Dowdy,
332 S.W.3d 868 (Mo. Ct. App. 2011).....9

North Dakota v. Birchfield,
858 N.W.2d 302 (N.D. 2015).....4

Ohio v. Hill, No. 2008-CA-0011,
(Ohio Ct. App. May 22, 2009).....9

Williams v. Florida, No. 5D14-3543
(Fla. Dist. Ct. App. June 5, 2015).....5

Wing v. Alaska,
268 P.3d 1105 (Alaska Ct. App. 2012).....8

MINNESOTA STATUTES

Minn. Stat. § 169A.20, subd. 2 (2013).....2

Minn. Stat. § 169A.24, subd. 1(1)-(2) (2013).....2

Minn. Stat. § 169A.276, subd. 1(a) (2013).....2

RULES

Supreme Court Rule 10(b).....4

Supreme Court Rule 10(c).....6

JURISDICTION

Respondent agrees with the jurisdictional statement as contained in the Petition.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Respondent agrees with the statutory and constitutional provisions contained in the Petition.

STATEMENT OF THE CASE AND FACTS

On August 5, 2012, at approximately 7:00 p.m. officers were dispatched to a Department of Natural Resources boat launch in South Saint Paul, Dakota County, Minnesota, on a report of three intoxicated males attempting to extract a boat out of the water with a truck. Officers were informed that the truck became stuck in the process. Upon receiving this information, law enforcement officers responded to the scene. Upon their arrival, a witness directed them to three males that appeared to be intoxicated. The three males were located near a truck stuck on the edge of the boat launch. Officers smelled an odor of alcoholic beverage coming from the males. Each of the males denied driving the truck. Two witnesses on scene identified the driver of the truck as the male wearing solely his underwear. A witness additionally advised that the underwear-clad male was stumbling as he walked from the boat to the truck. The underwear-clad male was later identified as the Petitioner.

Officers made contact with Petitioner. A strong odor of alcoholic beverage emanated from his

breath. Additionally, Petitioner's eyes were bloodshot and watery. Petitioner admitted to drinking alcohol but denied driving the truck. Officers located the keys to the vehicle in Petitioner's hand. Officers requested that Petitioner perform field sobriety tests but he refused. Officers then took Petitioner into custody and transported him to the South Saint Paul Police Department where he was read the Minnesota Implied Consent Advisory. Officers asked Petitioner to take a breath test; he refused stating, "I have no reason to take one."

Based on the officer's probable cause to believe that the Petitioner was operating a motor vehicle under the influence of alcohol and his subsequent refusal to submit to the breath test along with his three prior impaired driving convictions, the State charged Petitioner with two counts of First-Degree Driving While Impaired—Test Refusal in violation of Minn. Stat. §§ 169A.20, subd. 2 (2013); § 169A.24, subd. 1(1)-(2) (2013); 169A.276, subd. 1(a) (2013).[1]

The trial court found that the officer had probable cause to arrest the Petitioner, but dismissed the State's case, finding that the officer did not have a lawful basis to request the Petitioner to submit to a breath test. The Minnesota Court of Appeals reversed the lower court, finding the officer had a lawful basis to request a chemical test from the Petitioner because officers had probable cause to believe Petitioner violated Minnesota's Driving While Impaired (DWI) laws and could have obtained a search warrant to obtain a biological sample to

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[1] At the time of arrest, Petitioner had three or more prior driving while impaired convictions within ten years plus a previous felony DWI conviction making the instant offense a felony under Minn. Stat. § 169A.20, subd. 2 (2013); § 169A.24, subd. 1(1)-(2) (2013).

determine his blood alcohol concentration. The Minnesota Supreme Court granted review and affirmed, finding that the refusal statute is constitutional as applied to the Petitioner. The Minnesota Supreme Court affirmed the decision on grounds other than those expressed by the intermediate appellate court. The Minnesota Supreme Court specifically held that a warrantless search of the Petitioner's breath would have been constitutional as a search-incident-to-a-valid-arrest.

REASONS FOR DENYING THE PETITION

A. Petitioner's proposed question for review fails to accurately reflect the scope and application of the Minnesota Supreme Court's decision in *Bernard* and requires factual and legal analysis not reviewed or ruled upon by the Minnesota Supreme Court.

The Minnesota Supreme Court carefully articulates that *Bernard's* holding, which upholds the constitutionality of Minnesota's law that makes it a crime to refuse chemical testing, is limited to situations in which there has been a ***lawful arrest*** for DWI and the person has refused to take a ***breath test***. *State v. Bernard*, 859 N.W.2d 762, 768, 772 (Minn. 2015) (emphasis added). The Minnesota Supreme Court specifically stated that its ruling does not express an opinion as to whether a request for a blood or urine test could be justified under the search-incident-to-lawful-arrest exception. *Id.* at 768, n.6. However, Petitioner's proposed question for review implies that the Minnesota Supreme Court intended that its ruling apply to all chemical testing,

including blood test requests, irrespective of whether the person has been lawfully arrested. This overbroad analysis of *Bernard's* holding leads to legal argument and analysis not discussed by the Minnesota Supreme Court. If the petition is granted, the parties and this Court will be required to engage in unwarranted speculative discussions and arguments as to the scope and application of *Bernard* and the Fourth Amendment.

B. Minnesota's decision in *Bernard* does not conflict with the decisions of other state courts of last resort regarding the constitutionality of the criminalization of a DWI refusal.

The Minnesota Supreme Court has not decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. *See* Supreme Court Rule 10(b). Respondent is aware of only one other state court of last resort that has reviewed the specific issue addressed in *Bernard*. *See North Dakota v. Birchfield*, 858 N.W.2d 302 (N.D. 2015), *Pet. for Cert. Docketed* June 16, 2015. The *Birchfield* court held that North Dakota's refusal statute was constitutional facially and as-applied to defendant-appellant because it satisfied the general reasonableness requirement of the Fourth Amendment.[2] *Id.* at 310. Accordingly, the North Dakota Supreme Court, while providing alternative grounds for upholding the constitutionality of its

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[2] The *Birchfield* court does not articulate what specific chemical test was requested from the defendant-appellant and their result does not distinguish between a breath, blood or urine chemical test.

state's law making it a crime to refuse chemical testing, is not in direct conflict with the Minnesota Supreme Court's reasoning in *Bernard*.

Moreover, several lower courts within different states[3] have also reviewed their respective refusal statutes and all have upheld the constitutionality via a Fourth Amendment analysis. The Hawaii Intermediate Court of Appeals reviewed the constitutionality of Hawaii's refusal statute in *Hawai'i v. Yong Shik Won*,[4] 134 Hawai'i 59 (2014), *cert. granted* on June 24, 2014. The *Won* court held that Hawaii's refusal statute is constitutional finding that it was reasonable under the Fourth Amendment. Florida's Fifth District Court of Appeal reviewed the constitutionality of Florida's refusal statute. *Williams v. Florida*, No. 5D14-3543 (Fla. Dist. Ct. App. June 5, 2015).[5] The *Williams* court upheld

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[3] Additional jurisdictions have issued unreported decisions upholding the validity of DWI refusal statutes under a Fourth Amendment analysis. *See Hoover v. Ohio*, No. 13-3330 (6th Cir. Dec. 4, 2013) (The imposition of increased penalties for refusal to submit to a breath test was reasonable and did not violate the petitioner-appellant's Fourth Amendment rights). A similar issue was raised in *United States v. Muir*, No. 8:13-mj-03005-TMD (D. Md May 7, 2015) (The court did not find the refusal statute unconstitutional).

[4] Defendant-appellant did not refuse a chemical test; he agreed to submit to a breath test after an officer read Hawaii's Implied Consent Advisory. *Won*, 134 Hawai'i at 62. Defendant-appellant declined to take a blood test. *Id.* Based on *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), defendant-appellant argued that Hawaii's refusal statute was unconstitutional and given that, he was misinformed of the sanctions for refusing to submit to testing since the implied consent form referred to sanctions for a chemical test refusal. *Won*, 134 Hawai'i at 61.

[5] This opinion has not been released for publication in the permanent law reports.

Florida's refusal statute based upon the general reasonableness under the Fourth Amendment.

Because the Minnesota Supreme Court's decision in *Bernard* clearly does not conflict with the decision of another state court of last resort or of a United States court of appeals, this Court should deny the petition.

C. Minnesota's narrowly tailored decision in *Bernard* is consistent with this Court's previous decisions related to the scope of searches incident to arrest.

In *Bernard*, the Minnesota Supreme Court did not decide an important federal question in a way that conflicts with relevant decisions of this Court. *See* Supreme Court Rule 10(c). *Bernard* narrows the application of its holding to the criminalization of breath test refusals after a lawful DWI arrest. In reaching its decision, the Minnesota Supreme Court analyzed and relied on the United States Supreme Court opinion in *United States v. Robinson*, 414 U.S. 218 (1973). The *Bernard* court concluded that the United States Supreme Court decision in *Robinson* is still good law, including a determination that searches of a person incident to arrest "are reasonable regardless of the probability in a particular arrest situation that weapons or evidence would in fact be found." *Bernard*, 859 N.W.2d at 770, *quoting Robinson*, 414 U.S. at 235 (quotation marks omitted). In doing so, the Minnesota Supreme Court noted that "[T]he breath test was a search of Bernard's person that would have been no more intrusive than the myriad of other searches of the body that we and other courts have upheld as searches incident to a valid arrest." *Bernard*, 859

N.W.2d at 772. Therefore, far from overruling or narrowing *Robinson*, the Court recognized again *Robinson's* 'categorical rule,' which allows a search of the person of an arrestee justified only by the custodial arrest itself.

> We therefore conclude that a breath test is a search of the arrestee's person and is justified by virtue of the lawful arrest itself. As a result, we hold that a warrantless breath test of Bernard would have been constitutional under the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement.

Bernard, 859 N.W.2d at 772.[6]

Petitioner suggests that *Bernard* is in conflict with recent United States Supreme Court rulings related to searches incident to arrest. However, in *Bernard*, the court conducts a painstaking analysis to show that their decision is consistent with Fourth Amendment jurisprudence related to searches incident to arrest. The Minnesota Supreme Court specifically indicated that its analysis is applicable only to searches within the ***body*** for breath requests[7]

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[6] Although not specifically referenced by the Minnesota Supreme Court, the decision is also consistent with the United States Supreme Court decision and reasoning expressed in *Maryland v. King*, 133 S. Ct. 1958 (2013) (Use of a buccal swab to collect a DNA sample for a person arrested for a serious offense is a reasonable search under the Fourth Amendment).

[7] Footnote 6 specifically indicates that the analysis is based on the officer's request to submit to a breath test and this decision does not express an opinion as to whether a request for a blood or urine test could be justified as a search-incident-to-arrest. *Bernard* at 768.

and differentiates its decision from this Court's holdings related to searches involving the area in which the defendant was arrested. *See Arizona v. Gant*, 556 U.S. 332 (2009). The Minnesota Supreme Court in *Bernard* concedes that a search of Bernard's breath did not compel safety concerns for law enforcement or immediate preservation of evidence needs; however, this concession does not deviate from this Court's previous decisions. *Id. Bernard*, 859 N.W.2d at 765-72. The Minnesota Supreme Court distinguishes its ruling from this Court's decision in *Gant*, articulating that *Gant* did not address the search of a person, but focused on the search of the area from which the defendant was arrested, specifically the defendant's automobile. *Bernard*, 859 N.W.2d at 768. This is due to the separate analysis for a search of a person versus the search of the area surrounding a suspect. *Id.* at 768-69. The *Bernard* court concluded "that a warrantless breath test does not violate the Fourth Amendment because it falls under the search-incident-to-a-valid-arrest exception...[and it] is consistent with decisions from other courts."[8] *Id.* at 767 The *Bernard* court also

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[8] *Bernard*, 859 N.W.2d at 767 cites the following cases supporting this contention: *United States v. Reid*, 929 F.2d 990, 994 (4th Cir. 1991) (holding that breathalyzer tests were reasonable searches under the Fourth Amendment because they were searches incident to lawful arrests); *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1450 (9th Cir. 1986) ("It is clear then that the breathalyzer examination in question is an appropriate and reasonable search incident to arrest which appellants have no constitutional right to refuse."); *Byrd v. Clark*, 783 F.2d 1002, 1005 (11th Cir. 1986) (holding that "officers would have been justified in conducting a [breath] search" under the search-incident-to-arrest exception); *Wing v. Alaska*, 268 P.3d 1105, 1110 (Alaska Ct. App. 2012) (holding that a breath test was a valid search incident to arrest); *Missouri v. Dowdy*, 332 S.W.3d 868, 870 (Mo. Ct. App. 2011)

determined that there was not "a single case anywhere in the country that holds that a warrantless breath test is not permissible under the search-incident-to-a-valid-arrest exception." *Id.* at 767-68.

Because the Minnesota Supreme Court's decision in *Bernard* does not conflict in any way with relevant decisions of this Court, this Court should deny the petition.

CONCLUSION

No compelling reasons exist for this Court to grant the petition. Accordingly, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied in all respects.

Dated: July 15, 2015

(same); *Ohio v. Hill*, No. 2008-CA-0011, at *5 (Ohio Ct. App. May 22, 2009) (same); *Commonwealth, Dep't of Transp. v. McFarren*, 514 Pa. 411, 525 A.2d 1185, 1188 (1987) (same).

Respectfully submitted,

JAMES C. BACKSTROM
DAKOTA COUNTY ATTORNEY

By: Phillip D. Prokopowicz
Counsel of Record
Chief Deputy
Dakota County Attorney's Office
Dakota County Judicial Center
1560 Highway 55
Hastings, MN 55033
Telephone: (651) 438-4438
phil.prokopowicz@co.dakota.mn.us

No. 14-1470

In the Supreme Court of the United States

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Minnesota

REPLY BRIEF FOR PETITIONER

JEFFREY S. SHERIDAN
Sheridan & Dulas, P.A.
320 Eagandale Center
1380 Corporate Center Curve
Eagan, MN 55121
(651) 686-7870

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

Table of Authorities ii

Reply Brief for Petitioner 1

A. The Court Below Held As A Matter Of Law That A Compelled Search Of The Deep Lung Air Of Any Person Validly Arrested On Suspicion Of Driving While Impaired Is Permissible As A Search Incident To Arrest. 2

B. The Decision Below Stated A Rule Permitting Searches Incident To Arrest That Departs From This Court's Holdings. 4

C. Review By This Court Is Necessary To Resolve Confusion In the Lower Courts And Correct Repeated Misapplication Of The Fourth Amendment. 5

Conclusion 7

TABLE OF AUTHORITIES

Page(s)

CASES

Maryland v. *King*,
133 S. Ct. 1958 (2013) 4, 5

Missouri v. *McNeely*,
133 S. Ct. 1552 (2013) 1, 6, 7

Riley v. *California*,
134 S. Ct. 2473 (2014) 5

United States v. *Robinson*,
414 U.S. 218 (1973) 4, 5

Williams v. *State*, 2015 WL 3511222
(Fla. Dist. Ct. App. 2015) 6

REPLY BRIEF FOR PETITIONER

In this case, the Minnesota Supreme Court held that, under the search-incident-to-arrest doctrine, any person who is arrested on suspicion of driving while impaired may be required to submit to a warrantless chemical test of his or her deep lung air, and may be subjected to serious criminal penalties for refusing to take the test—even if the person is not prosecuted for, or is found not to have committed, the underlying DWI offense. In opposing review of this extraordinary decision, the State does not dispute several of the central arguments presented in the petition. The State thus very notably does *not* deny that the holding below "nullifies the warrant requirement in nearly every drunk-driving case" (Pet. App. 22a (dissenting opinion)); that this holding renders the decision in *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013), a virtual dead letter; that it perversely offers greater protection to the privacy of the area around a person than to the person's body; or that it involves a question of great practical importance, arising many thousands of times a year in jurisdictions acoss the Nation.

Instead, the State rests its opposition on three much more limited propositions. It contends (1) that review would require speculation about the scope of the Minnesota Supreme Court's decision; (2) that the holding below is consistent with this Court's rulings on the nature of the search-incident-to-arrest doctrine; and (3) that there is no conflict in the lower courts on the constitutionality of compelled-consent statutes like Minnesota's. On examination, each of these arguments is flawed.

A. The Court Below Held As A Matter Of Law That A Compelled Search Of The Deep Lung Air Of Any Person Validly Arrested On Suspicion Of Driving While Impaired Is Permissible As A Search Incident To Arrest.

At the outset, the State is incorrect in contending that, "[i]f the petition is granted, the parties and this Court will be required to engage in unwarranted speculative discussions and arguments as to the scope and application" of the decision below. Opp. 4. In fact, there is no doubt about the substance of the Minnesota Supreme Court's decision: that court very plainly held that a warrantless search of deep lung air may be compelled whenever a person is arrested on suspicion of driving while impaired.[1]

To be sure, as the State notes (at Opp. 3, 6), the court below purported to leave open the further question whether its holding also applies to compelled blood and urine tests. Pet. App. 10a-11a n.6. But that reservation does not militate against review, for several reasons.

First, even if limited to tests of deep-lung air, the holding that a warrantless chemical test may be ad-

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[1] The State is incorrect in contending that the petition's question presented "fails to accurately reflect the scope and application of the Minnesota Supreme Court's decision." Opp. i. The question presented correctly describes the decision below as holding "that a person may be compelled to submit to a warrantless breath test as a 'search incident to arrest,'" and against this background poses the question whether, "in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood." Pet. i.

ministered as a search incident to arrest is one of enormous practical and doctrinal importance. Compelled-consent statutes like Minnesota's give the arresting officer complete discretion whether to demand submission to a blood, urine, *or* breath test, all of which are treated identically by Minnesota law. See Pet. 4. The holding below, which allows officers to demand submission to a test of deep lung air (and thus to trigger imposition of criminal penalties for refusal to take that test) in *any* case where there has been a DWI arrest, accordingly authorizes the warrantless administration of a chemical test "in nearly every drunk-driving case." Pet. App. 22a (dissenting opinion). Whether the Minnesota Supreme Court's understanding of the search-incident-to-arrest doctrine was correct in these circumstances therefore is an enormously important question that merits review.

Second, *Birchfield* v. *North Dakota*, No. 14-1468, the subject of a petition for certiorari that is a companion to the one in this case, involves a prosecution that *was* premised on the defendant's failure to submit to a blood test.[2] Consequently, as we explain in the *Bernard* petition (at 29 n.10), granting review

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[2] The State here observes, correctly, that the decision of the North Dakota Supreme Court in *Birchfield* "does not articulate what specific chemical test was requested from the defendant-appellant and [that court's] result does not distinguish between a breath, blood or urine chemical test." Opp. 4 n.2. But this observation proves our point. In fact, there is no doubt that the *Birchfield* prosecution *did* involve refusal to submit to a blood test. See *Birchfield* Pet. 4; *Birchfield* Pet. App. 24a, 26a. That the North Dakota Supreme Court made nothing of this fact confirms that, for present purposes, there are no material differences between tests of blood and of deep lung air.

both in this case and in *Birchfield* would put before the Court the full range of factual circumstances in which test-refusal statutes are applied. That makes these cases uniquely favorable vehicles with which to resolve the question presented.

B. The Decision Below Stated A Rule Permitting Searches Incident To Arrest That Departs From This Court's Holdings.

The State also is wrong in arguing that the decision below "is consistent with this Court's previous decisions related to the scope of searches incident to arrest." Opp. 6. In making this contention, the State concedes that a search of petitioner's breath would have advanced neither "safety concerns for law enforcement" nor "immediate preservation of evidence needs" (Opp. 8), but nevertheless asserts that this Court's decision in *United States* v. *Robinson*, 414 U.S. 218 (1973), laid down a "categorical rule" that "allows a search of the person of an arrestee [that is] justified only by the custodial arrest itself." Opp. 7. This rule, the State continues, permits "searches within the **body**" of an arrestee even when "searches involving the area in which the defendant was arrested" would be impermissible. Opp. 7-8.

For reasons explained in the petition (at 11-15), however, this reasoning rests on a plain misreading of *Robinson* and this Court's subsequent decisions. We showed in the petition that, as a general matter, the Fourth Amendment provides the highest level of protection against "intrusio[n] into the human body." *Maryland* v. *King*, 133 S. Ct. 1958, 1969 (2013). On the face of it, under that settled understanding it was bizarre for the court below to state a rule that makes it easier to conduct a search in a person's body

than in the person's pockets. And all of the Court's search-incident-to-arrest decisions, including *Robinson*, have held that the search-incident-to-arrest exception applies *only* when a warantless search is necessary to address "concerns for officer safety and evidence preservation" (*Riley* v. *California*, 134 S. Ct. 2473, 2484 (2014))—concerns that categorically *never* exist when a breath test is at issue. The contrary decision of the court below therefore both departs from this Court's holdings and confuses a very important area of the law.[3] The State fails even to attempt to address these points.

C. Review By This Court Is Necessary To Resolve Confusion In the Lower Courts And Correct Repeated Misapplication Of The Fourth Amendment.

Finally, the State observes that there is no square conflict in the lower courts on the constitutionality of test-refusal statutes like Minnesota's. Opp. 4-6. But this observation, although correct so far as it goes, does not obviate the need for review, again for several reasons.

First, as explained in detail in the petition (at 10-26), neither the decision of the Minnesota Supreme Court in this case nor that of the North Dakota Supreme Court in *Birchfield* can be squared with this

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[3] The State is wrong in contending (Opp. 7 n.6) that the decision below is consistent with *Maryland* v. *King*, 133 S. Ct. 1958 (2013). Unlike *King*, where the search was required as a ministerial matter and did not involve any exercise of discretion, the search in this case is one that was "subject to the judgment of officers" (*id.* at 1970)—the paradigmatic circumstance where a warrant is required. Although we made this point in the petition (at 22), the State offers no response.

Court's holdings. Even absent a direct conflict in the lower courts, these erroneous rulings, which are premised on a manifest misunderstanding of this Court's doctrine but validate thousands of wrongful convictions each year, should be corrected by this Court.

Second, express conflict or not, there is pervasive confusion in the lower courts on the principles that govern this area of the law. It is revealing that each of the three courts below took different and mutually inconsistent approaches to the constitutionality of Minnesota's test-refusal statute, with the trial court finding the statute unconstitutional, the appellate court upholding it as "reasonable," and the court below opining that it is valid under the search-incident-to-arrest doctrine. Moreover, although the Minnesota Supreme Court expressly rejected the "reasonableness" analysis of the Minnesota Court of Appeals, the latter court's approach was explicitly endorsed by the North Dakota Supreme Court in *Birchfield*. And that court's related implied-consent rationale (also embraced by an appellate court in Hawaii, in a decision endorsed by the State here, see Opp. 5 & n.4) has in turn been repudiated by numerous other courts. See Pet. 23 & n.5.[4]

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[4] Squaring the circle, a Florida appellate court expressly "disagree[d] with the Minnesota Supreme Court's conclusion and reasoning" in this case, explaining that "breath-alcohol tests are not justified by either of the rationales for the [search-incident-to-arrest] exception" and that, "[t]o the extent that an exigent circumstance is presented by the evanescent nature of BAC, that reasoning was specifically rejected in *McNeely*." *Williams* v. *State*, 2015 WL 3511222, at *7 (Fla. Dist. Ct. App. 2015). But that court nevertheless upheld warrantless administration of a breath test "under a general reasonableness test" (*ibid.*)—the

Third, given the importance of the issue presented here and the frequency with which it arises, clarity in the law is essential. The decision below confuses the meaning of the search-incident-to-arrest doctrine—an important matter in its own right (see Pet. 10)—and offers a roadmap for circumvention of this Court's holding in *McNeely*. See Pet. 15. The issue arises many thousands of times each year, in jurisdictions across the Nation. And the absence of clear guidance from this Court on the governing rules will interfere with the continuing efforts of state and local governments to implement valid and effective responses to the problem of impaired driving, an effort that, as we show in the petition (at 30-32), is currently ongoing. For all of these reasons, immediate review by this Court of the decision below and of the North Dakota Supreme Court's decision in *Birchfield* is warranted.

CONCLUSION

For these reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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approach that the Minnesota Supreme Court in this case had labeled "contrary to basic principles of Fourth Amendment law." Pet. App. 7a.

Respectfully submitted.

JEFFREY S. SHERIDAN
Sheridan & Dulas, P.A.
320 Eagandale Center
1380 Corporate Center Curve
Eagan, MN 55121
(651) 686-7870

EUGENE R. FIDELL
Yale Law School
*Supreme Court Clinic**
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

AUGUST 2015

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* The representation of petitioner by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

No. 14-1470

In The

Supreme Court of the United States

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Minnesota

BRIEF OF *AMICUS CURIAE* MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND MINNESOTA SOCIETY FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER

DANIEL L. GERDTS
Counsel of Record
247 Third Avenue, S
Minneapolis, MN 55415
(763) 432-5855
daniel@danielgerdtslaw.com

BARRY S. EDWARDS
Suite 339
125 Main Street, SE
Minneapolis, MN 55414
(612) 310-7398
bse@barrysedwardslaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
IDENTITY AND INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. Laws Requiring Persons to Consent to Warrantless Searches of their Bodies are Incompatible with Fundamental Constitutional Protections of Individual Privacy and Liberty	3
II. The Political Push for a DWI Exception to the Fourth Amendment Has Weakened Our Courts' Resolve to Enforce Constitutional Curbs on Questionable Legislation	5
III. Leaving the Protection of Privacy and Personal Liberties to the Discretion of the Police is Bad Law and Bad Public Policy	7
IV. A Law Criminalizing Refusal to Submit to a Warrantless Corporeal Search Violates Fundamental Privacy Rights Deeply Rooted in Our Legal and Cultural Heritage	9
V. The Risk of Further Deterioration of the Individual's Right to Privacy and Personal Liberty Requires that the Refusal Statute be Found Unconstitutional	12
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

Camara v. Mun. Court of City & Cty. of San Francisco, 387 U.S. 523 (1967) 4

Florida v. Bostick, 501 U.S. 429 (1991) 10, 11

Gray v. Comm'r of Pub. Safety, 505 N.W.2d 357 (Minn. Ct. App. 1993), *rev'd*, 519 N.W.2d 187 (Minn. 1994) 5

Johnson v. United States, 333 U.S. 10 (1948) 16

Katz v. United States, 389 U.S. 347 (1967) 4, 8

McDonald v. United States, 335 U.S. 451 (1948) 8

Missouri v. McNeely, ___ U.S. ___, 133 S. Ct. 1552 (2013) 6, 7

Richards v. Wisconsin, 520 U.S. 385 (1997) 13

Riley v. California, 573 U.S. ___, 134 S. Ct. 2473 (2014) 13

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 10

State v. Brooks, 838 N.W.2d 563 (Minn. 2013) 7

State v. Hagen, 529 N.W.2d 712 (Minn. Ct. App. 1995) 14

State v. Netland, 762 N.W.2d 202 (Minn. 2009) 6

State v. Olmscheid, 492 N.W.2d 263 (Minn. Ct. App. 1992) 14

State v. Shriner, 751 N.W.2d 538 (Minn. 2008) 6

Szczech v. Comm'r of Pub. Safety, 343 N.W. 2d 305 (Minn. Ct. App., 1984) 5

TABLE OF AUTHORITIES – Continued

Page

Terry v. Ohio, 392 U.S. 1 (1968) 10

Trupiano v. U.S., 344 U.S. 699 (1948) 8

United States v. Drayton, 536 U.S. 194 (2002) 9, 10

United States v. Jones, 565 U.S. ___, 132 S. Ct. 945 (2012) 5

United States v. Lefkowitz, 285 U.S. 452 (1932) 8

United States v. Mendenhall, 446 U.S. 544 (1980) 10

OTHER AUTHORITIES

Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report, *Increases in Drug and Opioid Overdose Deaths – United States, 2000-2014* (1 January 2016) 13

Minn. Dept. of Pub. Safety, Office of Traffic Safety, *Minnesota Motor Vehicle Crash Facts* (2014) 12

Minn. Stat. §169A.20, subd. 2 (2014) 4

U.S. CONST. AMEND. IV ..... *passim*

U.S. CONST. AMEND. V 9

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, Minnesota Association of Criminal Defense Lawyers (MACDL) and the Minnesota Society for Criminal Justice (MSCJ) respectfully submits this brief of *amicus curiae* in support of Petitioner William Robert Bernard Jr.[1]

MACDL is a professional organization of criminal defense lawyers whose mission is to foster, maintain and encourage the integrity, independence, and expertise of the defense lawyer in criminal cases; to promote the proper administration of criminal justice, including the protection of individual rights; to advance the knowledge of law in the field of criminal defense by lectures, seminars and publications; and to represent and lobby on behalf of the Association before the legislative, executive and judicial bodies which determine policy for the state and federal governments in a manner consistent with the Association and its goals and objectives.

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[1] All parties consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amicus Curiae* MACDL affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* MACDL, its members, or its counsel made a monetary contribution to its preparation or submission.

The MSCJ is an organization of approximately fifty Minnesota defense attorneys. This college meets monthly to discuss developments in Minnesota criminal law and DWI defense practice. The MSCJ seeks to not only educate its members and other members of the bar regarding issues in criminal defense and the ancillary civil consequences of our criminal laws, but promotes justice by supporting change in the laws – both legislatively and through litigation in the courts. Overall, the MSCJ strives to protect and advance the civil rights and constitutional rights of the people of Minnesota, and as such has a largely private interest in the above captioned matter.

Minnesota was one of the first states to adopt a DWI test refusal statute, and the MACDL and MSCJ have been dealing with the practical and constitutional ramifications of such a law for decades, and intend to utilize their experience and expertise in clarifying the issues currently before the Court.

SUMMARY OF THE ARGUMENT

Whether ordinary persons may be criminally prosecuted for declining to consent to a police search of their bodies raises serious questions about the acceptable boundaries of police investigatory methods. Making it a criminal offense to do what in this nation of limited government power always has been recognized as a protected freedom – the freedom to say "no" – runs completely contrary to long-established

custom and good policy. There is no governmental or societal interest sufficient to justify the havoc that such laws would wreak on individual liberties by compelling the average person's cooperation with the police for the explicit purpose of providing evidence for one's own incarceration. If such laws are deemed constitutional, then additional laws, designed to promote the efficacy of law enforcement at the expense of simple freedoms, surely will follow, to the great detriment of all.

ARGUMENT

This Court should reject as contrary to the Constitution any attempt to force cooperation with a police investigation by making it a crime simply to decline to consent to a search.

I. Laws Requiring Persons to Consent to Warrantless Searches of their Bodies are Incompatible with Fundamental Constitutional Protections of Individual Privacy and Liberty.

The United States Constitution guarantees every citizen the fundamental right to be free from unreasonable police searches. U.S. CONST. AMEND. IV. The Fourth Amendment generally limits such reasonable searches to those (1) supported by a warrant, (2) issued by an impartial magistrate, (3) based on a finding of probable cause, and (4) particularly

describing the place to be searched, and the persons or things to be seized. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967).

This Court has long affirmed a person's right "to insist that the [government agents] obtain a warrant to search and that [that person] *may not constitutionally be convicted for refusing to consent to the inspection.*" *Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523, 540 (1967) (emphasis added). The Minnesota statute at issue here, however, runs directly contrary to that basic right by making it a crime for a driver to decline a chemical test of his breath, blood, or urine when requested by a peace officer who has "probable cause" to believe the driver has violated the prohibition on driving while impaired by alcohol or other intoxicants. Minn. Stat. §169A.20, subd. 2 (2014). The statute makes it a crime, punishable by up to seven years in prison, simply to insist on one's fundamental right to live free from warrantless government searches of one's own body.

II. The Political Push for a DWI Exception to the Fourth Amendment Has Weakened Our Courts' Resolve to Enforce Constitutional Curbs on Questionable Legislation.

In the specific context of laws forbidding drinking and driving, Minnesota Courts have attempted repeatedly to find an exception to the warrant requirement that uniquely justifies a police search for evidence of a driver's intoxication; these efforts to find a DWI exception to the Fourth Amendment have produced inconsistent and questionable results – perhaps because Fourth Amendment analysis should not turn on the nature of the crime giving rise to the case considered. As Justice Scalia recently noted, "There is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated." *United States v. Jones*, 565 U.S. ___, ___, 132 S. Ct. 945, 954 (2012).

The political origins of the extra-constitutional measures to "combat" impaired driving in Minnesota are well known; even the courts of this state have supported the efforts with over-wrought rhetoric better left on floor of the legislative chambers: "The trail of broken lives, bodies, and property left by drunk drivers is a holocaust on our highways." *Szczech v. Comm'r of Pub. Safety*, 343 N.W. 2d 305, 306 (Minn. Ct. App., 1984); *see also Gray v. Comm'r of Pub. Safety*, 505 N.W.2d 357, 360 (Minn. Ct. App. 1993) ("It is undisputed that the gravity of public concern is great."), *rev'd,* 519 N.W.2d 187 (Minn. 1994). In their efforts to find constitutionally plausible support for

the legislature's enactments, however, the courts too often have produced decisions lacking intellectual rigor.

In *State v. Shriner*, 751 N.W.2d 538, 549-50 (Minn. 2008), for example, the Minnesota Supreme Court found that in the case of a felony drunk driving violation the "exigent circumstances" exception permitted police to conduct the search without a warrant: "The rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause." *Id.* at 549. The next year the Minnesota Supreme Court extended that holding to include misdemeanor offenses, noting that "exigency does not depend on the underlying crime; rather, the evanescent nature of the evidence creates the conditions that justify a warrantless search." *State v. Netland*, 762 N.W.2d 202, 213 (Minn. 2009).

This Court abrogated both *Shriner* and *Netland*, declining to find a single-factor exigent circumstance exception to the warrant requirement based only on probable cause to believe there is impairing alcohol in a driver's body: "The context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a 'now or never' situation." *Missouri v. McNeely*, ___ U.S. ___, ___, 133 S. Ct. 1552, 1561 (2013).

After *McNeely*, the Minnesota Supreme Court embraced "consent" as the appropriate exception to the warrant requirement, even though drivers in Minnesota are told that Minnesota law *requires* them to submit to testing, and that refusing to "consent" is a crime: "the fact that someone submits to the search after being told that he or she can say no to the search supports a finding of voluntariness." *State v. Brooks*, 838 N.W.2d 563, 572 (Minn. 2013).

In cases charging a "refusal," however, Minnesota courts still sought an appropriate exception to the warrant requirement because even a compelled "consent" was unavailable when the driver did not take the test. The answer, provided by the court below in Petitioner's case, was the "search-incident-to-arrest" exception. Whether that exception truly applies is one of the central issues raised in the Parties' Briefs, and need not be re-examined here; but even in the unlikely event that it does, the Minnesota law making it a crime to refuse to consent to the search remains constitutionally suspect given that the demand for consent rests solely on the discretion of the peace officer's subjective conclusions, and dispenses entirely with the preferred neutral analysis of the magistrate.

III. Leaving the Protection of Privacy and Personal Liberties to the Discretion of the Police is Bad Law and Bad Public Policy.

May the citizen still insist on a warrant, without subjecting himself to prosecution, when the basis for

the requested search is nothing more than a peace officer's personal conclusion of probable cause? According to the Minnesota Supreme Court in this case, the answer is "no." But this Court repeatedly has warned that "bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations only in the discretion of the police." *Katz*, 389 U.S. at 358-59.

This Court also has observed that "[t]he right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." *McDonald v. United States*, 335 U.S. 451, 455-56 (1948). It further has observed that,

> In their understandable zeal to ferret out crime, and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement.

Trupiano v. U.S., 344 U.S. 699, 705 (1948); *accord United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) ("Security against unlawful searches is more likely to be attained by resort to search warrants than by

reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.").

This case not only re-confirms the need for warrants, and their pre-approval by judges, to provide security against unreasonable police intrusions upon the private lives of individuals, but also highlights how dispensing with the neutral and detached magistrate can lead to police abuse of excessive discretion with no remedy for the individual who chooses not to cooperate with the officer demanding a search of the individual's body. That individual is deemed a criminal for declining the search, even if demonstrably not guilty of the predicate offense supposedly justifying the arrest in the first place.

IV. A Law Criminalizing Refusal to Submit to a Warrantless Corporeal Search Violates Fundamental Privacy Rights Deeply Rooted in Our Legal and Cultural Heritage.

This Court consistently has recognized the right – inherent both in the Fourth and Fifth Amendments – of a citizen to choose to withhold cooperation with the police, and specifically to withhold either consent to a search or responses to police inquiries; indeed, the Court routinely has invoked the right to withhold cooperation when examining the boundaries of permissible police investigation. In *United States v. Drayton*, 536 U.S. 194, 197 (2002), for example, it described it as a protected freedom: "The Fourth

Amendment permits police officers to approach bus passengers at random to ask questions and to request their consent to searches, provided a reasonable person would understand that he or she is *free to refuse*." *Id.* at 197 (emphasis added). In *Florida v. Bostick*, 501 U.S. 429 (1991), this Court observed that "the Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could *refuse to cooperate*." *Id.* at 431 (emphasis added). In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court concluded that even when police have reason to believe that criminal activity is afoot, they may not punish an uncooperative suspect: "Of course, the person stopped is not obliged to answer, answers may not be compelled, and *refusal to answer furnishes no basis for an arrest*." *Id.* at 34 (White, J., concurring) (emphasis added); *accord United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("the person to whom questions are put remains free to disregard the questions and walk away").

In these and other opinions, this Court accepts the freedom to refuse consent as a fundamental, inherent right, without need of explication, even though the citizenry may be unaware of its breadth. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) ("While knowledge of the right to refuse consent is one factor to be taken into account, the government

need not establish such knowledge as the sine qua non of an effective consent.").

To protect the citizen's freedom to refuse cooperation, this Court specifically has restrained the police from suggesting any obligation on behalf of the person questioned: the police may request consent to search, *"as long as the police do not convey a message that compliance with their requests is required."* *Bostick*, 501 U.S. at 435 (emphasis added). Petitioner's case presents precisely the situation forbidden by this Court in *Bostick*: In Minnesota, a driver whom the police suspect of being in violation of the proscription against driving while under the influence is told that the law *requires* them to cooperate with the police by consenting to a test of their breath, blood, or urine, and that refusal to submit to the test requested will result in criminal prosecution.

Such a law simply cannot be squared with our society's – and this Court's – traditional protection of the right of the individual to say "no." Permitting Minnesota's refusal law to stand invites legislative bodies across the country to promulgate further measures aimed at coercing the cooperation of the individual with his or her own prosecution.

V. The Risk of Further Deterioration of the Individual's Right to Privacy and Personal Liberty Requires that the Refusal Statute be Found Unconstitutional.

If the Minnesota crime of test refusal is deemed constitutional, and merely arresting a person provides the police with the authority to require a search of his or her body, then legislatures would be free to enact any number of laws requiring citizen cooperation with police investigations that would all but eliminate a deeply rooted constitutional freedom.

Alcohol-related traffic deaths are but one set of many potential excuses to justify the elimination of the neutral and detached magistrate in favor of unfettered police discretion in compelling a search. Drivers suspected of speeding or texting would lead the list based on the available data.[2] The legislature could criminalize refusal to allow a warrantless search of a smart phone or vehicle computer upon probable cause to arrest for distracted driving or speeding, thereby effectively gutting this Court's recent holding

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[2] Of the 361 traffic fatalities in Minnesota in 2014, the State Department of Public Safety compiled the following data: 88 (24%) were known to be drunk-driving related; 94 (26%) were known to be speed related; and 61 (17%) were known to be distracted driving related. *See* Minn. Dept. of Pub. Safety, Office of Traffic Safety, ***Minnesota Motor Vehicle Crash Facts*** (2014), at https://dps.mn.gov/divisions/ots/reports-statistics/Pages/default.aspx (last visited Jan. 26, 2016). If the 24% of 361 fatalities justifies this extreme measure, certainly speeding and distracted driving do too, but the list need not stop there.

in *Riley v. California*, 573 U.S. ___, 134 S. Ct. 2473 (2014).

Likewise, according to the Centers for Disease Control and Prevention "[t]he United States is experiencing an epidemic of drug overdose (poisoning) deaths," resulting in 47,055 casualties in the United States in 2014.[3] If the 88 alcohol-related deaths on Minnesota roads in 2014 necessitates laws criminalizing a failure to consent to police searches, surely the scores of thousands of drug overdose deaths does too. Arresting suspected drug-abusers on probable cause could thereby also permit the search of their bodies to secure evidence of the drugs. Any number of other substances might also be found in bodies of the citizenry that would lend evidentiary support for criminal prosecutions. Those who object may be prosecuted for the refusal instead.

In 1997, this Court rejected neighboring Wisconsin's "blanket exception" to the knock-and-announce requirement deemed by Wisconsin as "necessitated by the special circumstances of today's drug culture." *Richards v. Wisconsin*, 520 U.S. 385, 392 (1997). But if a statute allowing an arrest for refusing a search is justified by the public health concern of impaired

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[3] *See* Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report, *Increases in Drug and Opioid Overdose Deaths – United States, 2000-2014* (last visited Jan. 1, 2016), copy accessed at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6450a3.htm?s_cid=mm6450a3_w (last visited Jan. 20, 2016).

driving, there is equal justification for police to arrest anyone who declines a body cavity search after an arrest for "probable cause" involvement in the drug trade. The Hobson's choice to the arrestee in such circumstances would always be between the indignity of acquiescence to a warrantless search or prosecution for the crime of refusing.

Upon probable cause to believe that a suspect has committed murder or rape, the legislature could empower police to demand consent to a warrantless test for DNA or consent to a search for weapons in the suspect's home. The suspect who refuses to grant consent to the searches, or who resists long enough to be *deemed* to have refused,[4] may then be prosecuted for the refusal with the same potential penalty as the original crime suspected.

The proof necessary to convict under the Minnesota Statute, moreover, does not require proof that the underlying predicate crime was committed.[5] The only elements required are proof that the police had "probable cause," that they made an appropriate demand, and that the subject of the demand declined to consent to the search requested. Whether the "probable cause" ultimately proves to be misplaced is

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[4] *See State v. Hagen*, 529 N.W.2d 712, 714 (Minn. Ct. App. 1995) ("A driver who fails to respond to an officer has refused to take the test").

[5] *See State v. Olmscheid*, 492 N.W.2d 263, 266 (Minn. Ct. App. 1992) (conviction on the refusal charge "not legally inconsistent" with acquittal on the charge of driving under the influence).

not a defense. In the murder investigation described above, for example, if the suspect refused to submit to the DNA testing, he could be convicted and sentenced to life in prison, despite a later discovery that the presumed deceased was in fact very much alive. While ethical prosecutors might reasonably decline prosecution in such cases, their discretion is not so fettered as to require it; the criminally proscribed conduct, after all, has indeed been committed.

The police, by virtue of such laws, will be disinclined to seek court approval for their searches in any but the rarest of cases. If a police investigator believes she has sufficient probable cause to support a request for judicial approval of the search at issue, then her demand for consent from the suspect is *ipso facto* deemed constitutionally approved by the legislature. This legal mechanism, that effectively removes any police incentive to seek judicial authorization of their investigative techniques, upsets the constitutional equilibrium by transferring discretion from the neutral and detached magistrate to the zealous officer on the street in contravention of this Court's well established precedent:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the

> often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948).

The Minnesota refusal statute abrogates the entire "point" of the Fourth Amendment by legislatively delegating to the police the power to insist on citizens' consent and cooperation with law enforcement prerogatives, under penalty of criminal sanctions. Delegating such expansive power to the police officer on the street, rather than to a neutral and detached official renders the Amendment's protection a mere form of words: "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in [demanding consent to] a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Johnson*, 333 U.S., at 14.

CONCLUSION

This Court should strike down as unconstitutional the Minnesota refusal statute that makes it a crime to decline a request to submit to a warrantless search of the individual's body.

Respectfully submitted,

DANIEL L. GERDTS
Counsel of Record
247 Third Avenue, S
Minneapolis, MN 55415
(763) 432-5855
daniel@danielgerdtslaw.com

BARRY S. EDWARDS
Suite 339
125 Main Street, SE
Minneapolis, MN 55414
(612) 310-7398
bse@barrysedwardslaw.com

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No. 14-1470

In the Supreme Court of the United States

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Writ of Certiorari to
The Supreme Court of Minnesota

BRIEF FOR PETITIONER

JEFFREY S. SHERIDAN
Sheridan & Dulas, P.A.
320 Eagandale Center
1380 Corporate Center Curve
Eagan, MN 55121
(651) 686-8800

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

QUESTION PRESENTED

Minnesota law makes it a criminal offense for a person who has been arrested for driving while impaired to refuse to submit to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol. Although the State acknowledges that such tests do not serve the purposes of officer safety or evidence preservation, a divided Minnesota Supreme Court held that a person may be compelled to submit to a warrantless breath test as a "search incident to arrest." From that starting point, the court held that the State may make refusal to submit to such a test a criminal offense. The question presented is:

Whether, in the absence of a warrant, a State may make it a crime for a driver to refuse to take a chemical test to detect the presence of alcohol in the driver's blood.

TABLE OF CONTENTS

Page

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement 4

A. Factual and legal background 6

B. The decisions below 8

Summary of Argument 12

Argument 14

A. Because a breath test is not administered to further officer safety or to preserve evidence, it is not a valid search incident to arrest 15

B. In the DUI context, there is no constitutional distinction between warrantless breath and blood tests 24

Conclusion 27

TABLE OF AUTHORITIES

Cases

Aguilar v. *State of Texas*,
378 U.S. 108 19

Arizona v. *Gant*,
556 U.S. 332 (2009) 15-18, 21

California v. *Trombetta*,
467 U.S. 479 (1984) 25

Camara v. *Municipal Court of San Francisco*, 387 U.S. 523 (1967) 12, 14, 26

Chimel v. *California*,
395 U.S. 752 (1969) ..... *passim*

Johnson v. *United States*,
333 U.S. 10 (1948) 19

Katz v. *United States*,
389 U.S. 347 (1967) 15, 19

Maryland v. *King*,
133 S. Ct. 1958 (2013) ..... *passim*

Missouri v. *McNeely*,
133 S. Ct. 1552 (2013) ..... *passim*

Riley v. *California*,
134 S. Ct. 2473 (2014) ..... *passim*

Schmerber v. *California*,
384 U.S. 757 (1966) 12, 18-21

Skinner v. *Ry. Labor Execs.' Ass'n.*,
489 U.S. 602 (1989) 23, 25, 27

Tennessee v. *Garner*,
471 U.S. 1 (1985) 25

Cases—continued

Terry v. *Ohio*,
392 U.S. 1 (1968) 18

United States v. *Drayton*,
536 U.S. 194 (2002) 22

United States v. *Flores-Montano*,
541 U.S. 149 (2004) 21

United States v. *Robinson*,
414 U.S. 218 (1973) ..... *passim*

Wyoming v. *Houghton*,
526 U.S. 295 (1999) 19

Statutes

75 Pa. Cons. Stat. § 1547(b)(1) 25

Ala. Code § 32-5-192 25

Alaska Stat. § 28.35 25

Ariz. Rev. Stat. § 28-1321(D)(1) 25

Ark. Code § 5-65 25

Conn. Gen. Stat. § 14-227b(b) 25

Conn. Gen. Stat. § 14-227c(b) 25

Ga. Code § 40-5-67.1 25

Haw. Rev. Stat. § 291E-15 25

Iowa Code § 321J 25

Ky. Rev. Stat. § 189A.105(2)(b) 25

La. Rev. Stat. § 32.666(A) 25

Md. Transp. Code § 16-205.1 25

Mass. Gen. Laws, ch. 90, § 24(1) 5

Statutes—continued

Mich. Comp. Laws § 257.625d(1) 25

Minn. Stat.

§ 169A.03 ..... 3, 6
§ 169A.20 ..... *passim*
§ 169A.24 ..... 2, 4, 6, 7
§ 169A.25 2
§ 169A.26 ..... 3, 6
§ 169A.50 3
§ 169A.51 ..... 1, 3, 6, 7
§ 169A.52 1
§ 169A.53 3
§ 169A.275 ..... 3, 4
§ 169A.276 ..... 2, 4, 7

Miss. Code § 63-11-21 25

Mont. Code § 61-8-402 25

Neb. Rev. Stat. § 60-498.01(2) 25

N.D. Code § 39-20-01.1(1) 26

N.H. Rev. Stat. § 265-A:14(I) 26

N.M. Stat. § 66-8-111(A) 26

N.Y. Veh. & Traf. Law § 1194 26

Okla. Stat., Tit. 47, § 753 26

Ore. Rev. Stat. § 813.100(2) 26

R.I. Gen. Laws §§ 31-27-2 26

S.C. Code § 56-5-2950(B) 26

Tex. Transp. Code § 724.012(b) 26

Tex. Transp. Code § 724.013 26

Statutes—continued

Vt. Stat., Tit. 23, § 1202 26

Wash. Rev. Code § 46.20.308 26

W. Va. Code §§ 17C-5-4(b), 17C-5-7 26

Wyo. Stat. § 31-6-102(d) 26

Miscellaneous Authorities

2 Wayne R. LaFave et al., Criminal Procedure (4th ed.) 21

David Eden et al., *Datamaster DMT Breath Test Operator Training Course Manual*, Minn. Dep't of Pub. Safety (Nov. 5, 2013) 24

Office of Attorney General, Crime Laboratory Division, *ND Intoxilyzer S-D5 (Five) Chemical Test Operator Instructions Using Gas Standards* 4 (2008) 24

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Minnesota Supreme Court (*Bernard* Pet. App. 1a-34a) is reported at 859 N.W.2d 762 (Minn. 2015). The decision of the Minnesota Court of Appeals (Pet. App. 35a-46a) is reported at 844 N.W.2d 41 (Minn. App. 2014). The decision of the Minnesota District Court (Pet. App. 47a-61a) is unreported.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on February 11, 2015. That court denied petitioner's motion for rehearing on March 16, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause * * *.

The Minnesota Statutes, M.S.A. § 169A.20, subd. 2, provide in relevant part:

> It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license).

M.S.A. § 169A.24 provides in relevant part:

> **Subdivision 1. Degree described.** A person who violates section 169A.20 (driving while impaired) is guilty of first-degree driving while impaired if the person:
>
> (1) commits the violation within ten years of the first of three or more qualified prior impaired driving incidents;
>
> * * *
>
> **Subd. 2. Criminal penalty.** A person who commits first-degree driving while impaired is guilty of a felony and may be sentenced to imprisonment for not more than seven years, or to payment of a fine of not more than $14,000, or both. The person is subject to the mandatory penalties described in section 169A.276 (mandatory penalties; felony violations).

M.S.A. § 169A.25 provides in relevant part:

> **Subdivision 1.**
>
> * * *
>
> (b) A person who violates section 169A.20, subdivision 2 (refusal to submit to chemical test crime), is guilty of second-degree driving while impaired if one aggravating factor was present when the violation was committed.
>
> **Subd. 2. Criminal penalty.** Second-degree driving while impaired is a gross

> misdemeanor.[1] The mandatory penalties described in section 169A.275 * * * may be applicable.

M.S.A. § 169A.26 (2014) provides in relevant part:

> **Subdivision 1.** * * * (b) A person who violates section 169A.20, subdivision 2 (refusal to submit to chemical test crime), is guilty of third-degree driving while impaired.
>
> **Subd. 2. Criminal penalty.** Third-degree driving while impaired is a gross misdemeanor. The mandatory penalties described in section 169A.275 * * * may be applicable.

M.S.A. § 169A.51, subd. 1 (2014) provides in relevant part:

> Any person who drives, operates, or is in physical control of a motor vehicle within this state or on any boundary water of this state consents, subject to the provisions of sections 169A.50 to 169A.53 (implied consent law), and section 169A.20 (driving while impaired), to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance. The test must be administered at the direction of a peace officer.

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[1] "'Gross misdemeanor' means a crime for which a person may be sentenced to imprisonment for not more than one year, or to payment of a fine of not more than $3,000, or both." M.S.A. § 169A.03, subd. 8.

M.S.A. § 169A.275, subd. 1(a) provides, in relevant part:

> (a) The court shall sentence a person who is convicted of a violation of section 169A.20 (driving while impaired) within ten years of a qualified prior impaired driving incident to either:
>
> (1) a minimum of 30 days of incarceration, at least 48 hours of which must be served in a local correctional facility; or
>
> (2) eight hours of community work service for each day less than 30 days that the person is ordered to serve in a local correctional facility.

M.S.A. § 169A.276, subd. 1(a) provides:

> The court shall sentence a person who is convicted of a violation of section 169A.20 (driving while impaired) under the circumstances described in section 169A.24 (first-degree driving while impaired) to imprisonment for not less than three years. In addition, the court may order the person to pay a fine of not more than $14,000.

STATEMENT

Minnesota, like North Dakota and eleven other States, makes it a crime for anyone arrested for driving while impaired to refuse to submit to a warrantless test of the driver's breath, blood, or urine to detect the presence of alcohol. This case is one of three currently before the Court that challenge the constitutionality of such test-refusal statutes.

In *Birchfield* v. *North Dakota*, No. 14-1468 (cert. granted Dec. 11, 2015), and *Beylund* v. *Levi*, No. 14-1507 (cert. granted Dec. 11, 2015), the North Dakota Supreme Court upheld that State's laws on the ground that such test requirements are per se reasonable or that motorists may be deemed to have consented to the administration of warrantless tests. In this case, the Minnesota Supreme Court upheld its State's compelled-consent law on the very different ground that compelled application of a breath test—a procedure that requires the insertion of a tube into the driver's mouth to obtain "deep-lung air"—is permissible as a routine search incident to arrest, and is therefore *never* subject to the Fourth Amendment's warrant requirement. In reaching this conclusion, the court below recognized that, when a search is directed at the area or items near an arrestee, the search is permissible only to protect officer safety or to prevent the active destruction of evidence. But the court held that these limits do not apply at all when the search is of the person of the arrestee, making such searches per se permissible.

To avoid duplication, our brief in *Birchfield* addresses issues that are common to that case and this one. Petitioner's brief in this case therefore is directed principally to the search-incident-to-arrest issue. As to that, as we will explain below, the Minnesota Supreme Court's holding is manifestly wrong: it untethers the search-incident-to-arrest exception from the exception's rationale, while giving greater constitutional protection to an arrestee's pockets or handbag than to the arrestee's body. Unsurprisingly, that holding misunderstands both hornbook Fourth Amendment law and recent decisions of this Court. It should be set aside.

A. Factual and legal background.

1. Minnesota law provides that "any person who drives, operates, or is in physical control of a motor vehicle within this state or on any boundary water of this state" is deemed to "consent[] * * * to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance." M.S.A. § 169A.51, subd. 1(a). In a number of circumstances—among them, when a person has been validly arrested for driving while impaired—the law also makes it "a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine." M.S.A. § 169A.20, subd. 2.[2]

Criminal penalties for violating the test-refusal statute are the same as or greater than those for the separate offense of driving while impaired. Test refusal leads to as much as a year in prison and a fine of up to $3,000 for a third-degree violation, and up to as many as seven years' imprisonment and a fine of up to $14,000 for a first-degree violation. M.S.A. §§ 169A.03, subds. 3, 8; 169A.24-169A.26; 169A.75-169A.76 (2014). First-degree test refusal is classified as a felony. *Id.* § 169A.24, subd. 2.

2. This case "arises from a report that police received on August 5, 2012, that three men were attempting to get a boat out of the water at a boat launch in South Saint Paul." *Bernard* Pet. App. 3a. "When police arrived at the boat launch, a witness told the officers that the men's truck became stuck in the

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[2] Officers may take action against a driver who refuses a blood or urine test "only if an alternative test was offered"; this limitation does not apply to breath tests. M.S.A. § 169A.51, subd. 3.

river while they were trying to pull their boat out of the water." *Ibid.* One of the men, petitioner here, "admitted to police that he had been drinking, but he and the other men denied driving the truck." *Ibid.* When witnesses nevertheless identified petitioner as the truck's driver, the officers arrested him on suspicion of driving while impaired. *Ibid.*

The officers proceeded to read petitioner the Minnesota Implied Consent Advisory. The advisory informed petitioner that "refusal to take a [chemical alcohol test] is a crime" and that petitioner could consult an attorney only if it did not "unreasonably delay administration of the test." M.S.A. § 169A.51, subd. 2. Under Minnesota law, the officer requiring a test may "direct whether the test is of blood, breath, or urine." *Id.* § 169A.51, subd. 3. The officers in this case chose a breath test. See *Bernard* Pet. App. 4a. At no point did the officers make any attempt to obtain a search warrant to authorize administration of the test.

After petitioner declined to take the test, the State charged him with two counts of the crime of First Degree Driving While Impaired—Test Refusal, in violation of Minn. Stat. § 169A.20, subds. 2-3 (2014). *Bernard* Pet. App. 4a. First-degree test refusal carries a mandatory minimum sentence of three years in prison, with a maximum of seven years' imprisonment and a fine of up to $14,000. Minn. Stat. § 169A.24, subd. 2 (2014); § 169A.276, subd. 1(a) (2014). The State did not charge petitioner with impaired driving. *Bernard* Pet. App. 50a.

B. The decisions below.

1. Petitioner filed a motion to dismiss, arguing that the State's imposition of criminal penalties for refusing to submit to a warrantless breath test violates the

Fourth Amendment. *Bernard* Pet. App. 50a. The state trial court agreed and ordered the prosecution dismissed. *Id.* at 47a-61a. The court started from the proposition that the Minnesota test-refusal statute is meant to impose criminal penalties only for refusal of a lawful demand to be tested. In this case, the court continued, a warrantless search is per se unreasonable, "subject only to a few specifically established and well delineated exceptions." *Id.* at 54a-55a (citations and internal quotation marks omitted). Those exceptions include consent and the existence of exigent circumstances, but here petitioner "refused to consent to provide a sample of his breath" and, under this Court's holding in *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013), something more is required than the "'natural dissipation of alcohol in the blood' to establish an exigency justifying a warrantless search." *Id.* at 55a, 58a. Accordingly, the trial court held, "[b]ecause no warrant was obtained and none of the recognized exceptions to the warrant requirement apply, no lawful basis exists in this case to request submission to a chemical test." *Id.* at 59a.

The Minnesota Court of Appeals reversed, holding that the State could compel petitioner to take a blood alcohol test because the arresting officers had probable cause to search petitioner and could have secured a warrant. *Bernard* Pet. App. 35a-46a. The court reasoned: "[T]he officer had a lawful option to require [petitioner] to submit to a chemical test, based on a search warrant, and he instead gave Bernard the choice to voluntarily submit to warrantless testing. That the officer chose one approach (the authority to make the request under the implied consent statute) rather than another (the authority to obtain a warrant under the impaired driving statute) does not make penalizing [petitioner's] decision unconstitutional[.]"

Id. at 43a. In reaching this conclusion, the court "recognize[d] that the officer did not actually possess a search warrant at the time of his request," but it regarded that omission as immaterial because "the constitutional and statutory grounds for a warrant plainly existed before the [test] request." *Ibid.*

2. The Minnesota Supreme Court in turn repudiated the appellate court's reasoning as "contrary to basic principles of Fourth Amendment law" because "[a] warrantless search is generally unreasonable, unless it falls into one of the recognized exceptions to the warrant requirement." *Bernard* Pet. App. 7a. But, in a divided ruling, the court below nevertheless held application of the state test-refusal law constitutional, reasoning that "a warrantless breath test of [petitioner] would not have violated the Fourth Amendment because it is a search incident to [petitioner's] valid arrest." *Id.* at 9a.

In reaching this conclusion, the court acknowledged both that "the State in this case cannot show that a search of [petitioner's] breath was related to officer safety or concerns that [petitioner] would destroy evidence," and that this Court "has required either a concern for officer safety or a concern over the preservation of evidence to support the constitutionality of a warrantless search of the area where the defendant was arrested or a search of items near the defendant." *Bernard* Pet. App. 11a & n.7, 12a. But the Minnesota court held that these considerations have no bearing on the legality of a search incident to arrest when a warrantless search concerns, not the "area" or "items" near the defendant, but "the body of a person validly arrested." *Id.* at 12a.

The court believed that this conclusion follows from what it characterized as this Court's holding in *United*

States v. *Robinson*, 414 U.S. 218 (1973), that "a warrantless search of a person [was] categorically reasonable under the Fourth Amendment as a search incident to that person's valid arrest." *Bernard* Pet. App. 13a. And the court below opined that this rule was reaffirmed in *Riley* v. *California*, 134 S. Ct. 2473 (2014), which it understood to permit a broader search of "the person of an arrestee" than of the "area where the defendant was arrested" or of "items near the defendant." *Bernard* Pet. App. 17a, 11a-12a. Accordingly, the Minnesota court held that "a warrantless breath test of [petitioner] would have been constitutional under the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement." *Id.* at 19a. And that conclusion, the court found, disposed of petitioner's appeal because petitioner "does not have a fundamental right to refuse a constitutional search." *Id.* at 20a.

3. Justices Page and Stras issued a joint dissent. Criticizing the majority for "a decision that is as notable for its disregard of Supreme Court precedent as it is for its defective logic," the dissent pointed to "[t]wo erroneous assumptions [that] permeate the court's analysis." *Bernard* Pet. App. 23a.

First, the dissent noted that this Court "has never implied, much less stated, that the search-incident-to-arrest exception extends to the forcible removal of substances from within a person's body." *Bernard* Pet. App. 23a. Any doubt about this, the dissent continued, "vanished after" this Court's decision in *Riley*: "Given *Riley*'s clarification that *Robinson* [which approved a search of a cigarette package in an arrestee's pocket] applies only to physical evidence found on a person's body—and not digital content found on cell phones—the only logical conclusion is that the removal of breath

(or blood or urine) from the body to discover an arrestee's blood alcohol level is not part of a search incident to arrest." *Id.* at 25a, 26a. In the dissent's view, "[i]t seems obvious that, similar to the digital content of a cell phone, alveolar 'deep-lung' air 'differ[s] in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *Id.* at 27a (quoting *Ri- ley*, 134 S. Ct. at 2489). The dissent added that "[t]ypically, a person taking a breath test must insert a tube into his or her mouth and then comply with the officer's instructions to blow into the tube at a specified rate until the breathalyzer had had sufficient time to analyze a sample of deep-lung air" (*id.* at 28a), and the majority "does not cite a single Supreme Court case authorizing such a profound intrusion into a person's bodily integrity during a search incident to arrest" (*ibid.*).

The dissent also challenged the majority's "equally extreme" holding that "the rationales for the search-incident-to-arrest exception—officer safety and preventing the destruction of evidence—do not apply to searches of a person." *Bernard* Pet. App. 29a. In the dissent's view, "neither *Robinson* nor *Riley* rejected [those] rationales as bookends for the circumstances under which the search-incident-to-arrest exception applies." *Id.* at 30a. Indeed, the dissent continued, "[t]he only justification for allowing police to conduct a warrantless breath test is the preservation of evidence due to the natural dissipation of alcohol from a person's bloodstream. In *McNeely*, however, the Supreme Court specifically rejected the proposition that the natural metabolization of alcohol constitutes a per se exigency justifying a warrantless blood test." *Id.* at 31a. And "[i]t strains credulity to suppose that, after the Supreme Court carefully examined the exigent-circumstances exception in *McNeely*, it would conclude

in some future case that the search [in that case] would have been justified anyway under the search-incident-to-arrest doctrine, which according to *Chimel* [v. *California*, 395 U.S. 752 (1969)] and *Riley* turns on the same rationale regarding the preservation of evidence that the Supreme Court explicitly rejected in *McNeely*." *Id.* at 32a.

In this setting and because, under *Camara* v. *Municipal Court of San Francisco*, 387 U.S. 523 (1967), "a state cannot criminalize the refusal to con- sent to an illegal warrantless search," the dissent concluded that "the State may not constitutionally convict persons who exercise their 'constitutional right to insist that police obtain a warrant.'" *Bernard* Pet. App. 33a, 34a (quoting *Camara*, 387 U.S. at 540) (brackets omitted).

4. The court below subsequently denied a petition for rehearing, while noting that "members of the court disagree about the effect of" this Court's decision in *McNeely* and *Schmerber* v. *California*, 384 U.S. 757 (1966). *Bernard* Pet. App. 62a.

SUMMARY OF ARGUMENT

The court below premised its holding on the proposition that the search-incident-to-arrest exception to the warrant requirement permits *any* search of an arrestee's person—and that searches of the person are not limited by the rationales that determine the scope of searches incident to arrest in all other contexts. That illogical approach is utterly inconsistent with this Court's decisions.

A. The Court has been clear and consistent in its explanation of the basis for the search-incident-to-arrest exception: it is designed to preserve officer safety and prevent the destruction of evidence. All

agree that those rationales categorically can have no application to breath (or blood) tests. In the DUI context, the arrestee, once arrested, can do nothing to alter the alcohol content of his or her blood. And, like the cell phone data at issue in *Riley*, an arrestee's breath cannot be used as a weapon to harm the arresting officer or effectuate the arrestee's escape. To reach its conclusion below, the Minnesota Supreme Court accordingly held that the usual rationales for the search-incident-to-arrest doctrine, while governing searches of the arrestee's property or of the area near the arrestee, have no application at all to searches of the arrestee's *person*.

This holding, however, turns Fourth Amendment doctrine on its head. It is fundamental that a person's body is entitled to the *highest* level of protection under the Fourth Amendment, not the lowest, a point that this Court has emphasized repeatedly. The court below relied for its contrary ruling on this Court's decision in *Robinson*, but that decision, like the Court's other holdings addressing the search-incident-to-arrest exception, characterized the doctrine as relying on concerns for officer safety and evidence preservation. As the Court demonstrated in *Riley*, *Robinson*'s holding is entirely consistent with the view that the exception applies only when the category of search at issue raises those concerns. The Minnesota Supreme Court's very different understanding is in obvious tension with many of this Court's decisions and would render the holding in *McNeely* a virtual dead letter.

B. A different outcome is not required because the test demanded in this case was one of breath rather than of blood or urine. This Court has held that tests of "deep-lung" air are searches within the meaning of the Fourth Amendment that implicate significant privacy

interests. That is so for good reason; breath tests like the one demanded in this case require the insertion of a mouthpiece and lengthy, continuous exhalation. Accordingly, virtually all States that place restrictions on nonconsensual blood tests place equivalent restrictions on nonconsensual breath tests, which is a powerful demonstration that the two types of test implicate equivalent privacy interests. That consideration, along with the Minnesota Supreme Court's misunderstanding of the search-incident-to-arrest exception, requires reversal of the decision below.

ARGUMENT

There appear to be some significant areas of common ground between the parties in this case. The State, and the court below, evidently recognize that the Fourth Amendment authorizes a search only when (1) the searching officer obtains a warrant or (2) a recognized exception to the warrant requirement applies. We agree. And all appear to agree that a State may criminalize refusal to submit to a search only if the requested search itself would satisfy the Fourth Amendment's requirements. This Court reached just that conclusion in *Camara*, as we explain in more detail in petitioner's brief in *Birchfield*.

In nevertheless upholding the challenged state law in this case, the court below ruled that a warrantless search is constitutional under the search-incident-to-arrest exception to the warrant requirement; it understood this Court's decisions in *Riley* and *Robinson* to hold that *any* search of an arrestee's person is a valid search incident to arrest. But that holding, which gives greater Fourth Amendment protection to the place where a person is standing than to the person's body, surely is wrong: "The Fourth Amendment lists 'persons' *first* among the entities protected against

unreasonable searches and seizures." *Maryland* v. *King*, 133 S. Ct. 1958, 1982 (2013) (Scalia, J., dissenting). Moreover, as the dissent below recognized (and the majority did not deny), the Minnesota Supreme Court's holding "nullifies the warrant requirement in nearly every drunk-driving case" (*Bernard* Pet. App. 22a)—while, as a practical matter, reading this Court's *McNeely* decision off the books. Consequently, the holding below should not stand.

A. Because a breath test is not administered to further officer safety or to preserve evidence, it is not a valid search incident to arrest.

1. As we explain in more detail in petitioner's brief in *Birchfield* (at 12-14), this Court has made clear time and again that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment." *Arizona* v. *Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz* v. *United States*, 389 U.S. 347, 357 (1967)). This fundamental rule is "subject only to a few specifically established and well-delineated exceptions." *Ibid.* This case concerns the nature of one of these exceptions, that for "a warrantless search incident to a lawful arrest." *Riley*, 134 S. Ct. at 2482.

Under the search-incident-to-arrest exception, this Court has held permissible (1) searches of the person of the arrestee and (2) searches of the area within the control of the arrestee. *Riley*, 134 S. Ct. at 2483; *Robinson*, 414 U.S. at 224. In both circumstances, however, the Court has been very clear on the exception's rationale. First, "[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or

effect his escape." *Chimel* v. *California*, 395 U.S. 752, 762-763 (1969). And second, an arresting officer may "search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Id.* at 763. These two *Chimel* rationales "ensure[] that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." *Gant*, 556 U.S. at 339. The Court repeatedly has reaffirmed the limits on the search-incident-to-arrest exception stated in *Chimel*, which "laid the groundwork for most of the existing search incident to arrest doctrine." *Riley*, 134 S. Ct. at 2483. See also *Robinson*, 414 U.S. at 235; *Gant*, 556 U.S. at 338-339.

Most recently, in *Riley*, the Court reiterated "that the *Chimel* concerns for officer safety and evidence preservation underlie the search incident to arrest exception." 134 S. Ct. at 2484. From that starting point, the Court held that the search of cell phone data may not be justified as a search incident to arrest because "[d]igital data used on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape" (*id.* at 2485) and the government's concerns that cell phone data might be destroyed remotely or encrypted "are distinct from *Chimel*'s focus on a defendant who responds to arrest by trying to conceal or destroy evidence within his reach" (*id.* at 2486). And although the Court recognized "an arrestee's reduced privacy interests upon being taken into police custody," it found dispositive that, "when 'privacy-related concerns are weighty enough' a 'search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.'" *Id.* at 2488 (quoting *Maryland* v. *King*, 133 S. Ct. 1958, 1979 (2013)).

2. The court below acknowledged that these *Chimel* rationales limit the scope of the search-incident-to-arrest exception as it applies to the search of the "*area* where the defendant was arrested or a search of *items* near the defendant." *Bernard* Pet. App. 12a (emphasis added). And the court recognized that "the State in this case cannot show that a search of [petitioner's] breath was related to officer safety or concerns that he would destroy evidence." *Id.* at 11a & n.7. That conclusion is beyond serious dispute. As this Court recognized in *McNeely*, blood alcohol content dissipates at a steady, predictable rate—and, in any event, dissipation is wholly beyond the control of a person in custody. The concern about destruction of evidence therefore cannot, without more, justify the search of a person's deep-lung air. Nor is the officer-safety rationale relevant. Just like the digital cell phone data at issue in *Riley*, a person's breath "cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape." 134 S. Ct. at 2485.

The court below nevertheless held, however, that the search-incident-to-arrest exception applies in this context because the majority believed that the limitations described by this Court in *Riley*, *Gant*, *Robinson*, and *Chimel* do not apply to "the warrantless search of the *body* of a person validly arrested." *Bernard* Pet. App. 12a (emphasis added). Thus, under the holding below, searches of an arrestee's body do not require *any* justification if they are associated with an arrest. Minnesota embraced that argument in its brief opposing certiorari. See *Berard* Opp. Br. 7-8.

This holding can fairly be said to turn Fourth Amendment doctrine on its head, and simply cannot be reconciled with this Court's decisions. "No right is held more sacred, or is more carefully guarded, * * * than

the right of every individual to the possession and control of his *own person*, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968) (emphasis added). For this reason, the *Chimel* rationales apply *both* to property found on or near the arrestee *and* to the person of the arrestee. Although the court below believed otherwise, that seemingly self-evident point was affirmed in *all* of this Court's search-incident-to-arrest decisions: as the Court explained in *Riley*, in *Robinson* "the Court *applied* the *Chimel* analysis in the context of a search of the arrestee's person." 134 S. Ct. at 2483 (emphasis added). See *id.* at 2484 ("*Gant*, like *Robinson*, recognized that the *Chimel* concerns for officer safety and evidence preservation underlie the search incident to arrest exception"). The majority below cited no decision of this Court that authorized *per se* searches incident to arrest inside a person's body; as the dissenters below explained, "[t]he reason is that no such case exists." *Bernard* Pet. App. 28a.

That necessarily is so. It would be perverse to suggest that a greater degree of justification is required for a search of an arrestee's *property* and of the area surrounding the arrestee than for a search inside the arrestee's *body*. After all, "the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. This Court has repeatedly stressed "the unique, significantly heightened protection afforded against searches of one's person." *Wyoming* v. *Houghton*, 526 U.S. 295, 303 (1999). See also *King*, 133 S. Ct. at 1969 ("Virtually any intrusio[n] into the human body * * * will work an invasion of cherished personal security.") (quotations omitted). For that reason, the Court explained in *Schmerber* that the rationales for a search incident to arrest "have little applicability with respect to searches

involving intrusions beyond the body's surface," as "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." 384 U.S. at 769-770.

In fact, that point becomes clear from the holding of *Schmerber* itself. In that case, as in this one, the State sought to require a person arrested on suspicion of DUI to take a chemical test. But the Court held that an arrest on probable cause was an insufficient basis to justify the search: "the mere fact of a lawful arrest does not end our inquiry." 384 U.S. at 769. As the Court explained:

> Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 13-14 [(1948)]; see also *Aguilar* v. *State of Texas*, 378 U.S. 108, 110-111 [(1964)]. The importance of informed, detached and deliberate determinations of the issue whether or

> not to invade another's body in search of evidence of guilt is indisputable and great.

Id. at 770.[3]

3. In nevertheless holding that the search-incident-to-arrest exception applies here, the court below relied on the statement in *Robinson* (repeated in *Riley*) that searches of a "person" incident to arrest are permitted "regardless of 'the probability in a particular arrest situation that weapons or evidence would in fact be found.'" 134 S. Ct. at 2485 (quoting 414 U.S. at 235). See *Bernard* Pet. App. 14a. But the court below missed this Court's point.

To begin with, despite its broad language, *Robinson* recognized that the search-incident-to-arrest doctrine is "based upon the need to disarm and to discover evidence." 414 U.S. at 235. To be sure, *Robinson* did not require a case-specific demonstration that a particular defendant posed those dangers; exceptions to the warrant requirement "do not require an assessment of whether the policy justifications underlying the exception * * * are implicated in *a particular case*." *McNeely*, 133 S. Ct. at 1559 n.3 (emphasis added). But this does not mean that *any* search of a person is automatically reasonable under the search-incident-to-arrest exception. Rather, the Court "ask[s] * * * whether application of the search incident to arrest doctrine to this particular *category* of [search] would 'untether the rule from the justifications underlying the *Chimel* exception.'" *Riley*, 134 S. Ct. at 2485 (quot-

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[3] Of course, *Schmerber* upheld the State's authority to require a chemical test in the circumstances of that case, but it did so under the exigent circumstances exception, not as a search incident to arrest. See 384 U.S. at 770-772. The scope of that holding has been clarified by *McNeely*.

ing *Gant*, 556 U.S. at 343) (emphasis added). The necessary connection existed in *Robinson*, where the "unknown physical objects" concealed in Robinson's cigarette pack "pose[d] risks, no matter how slight, during the tense atmosphere of a custodial arrest." *Ibid.* But, in sharp contrast, the breath test at issue here (like the search of cell phone data at issue in *Riley*, see *id.* at 2485-2488) concededly *never* could have bearing either on officer safety or on evidence preservation. Therefore, it is a category of search that can have *no* connection to the *Chimel* justifications.

Moreover, the privacy interests at stake with chemical tests of breath, blood, or urine taken from inside the body are vastly greater than was Robinson's interest in keeping private the contents of his cigarette pack. See, *e.g.*, 2 Wayne R. LaFave et al., Criminal Procedure § 3.5(c) (4th ed.) ("Whatever *Robinson* * * * mean[s] in other contexts, [it has] no effect upon the limits imposed by the Court in *Schmerber v. California* upon the taking of a blood sample or a comparable intrusion into the body." (footnote omitted)). This Court has repeatedly stated that intrusions "beyond the body's surface" implicate much greater "interests in human dignity and privacy" than do searches of inanimate objects or places. *Schmerber*, 384 U.S. at 769-770. See also *United States* v. *Flores-Montano*, 541 U.S. 149, 152 (2004) (noting that "highly intrusive searches of the person" implicate "dignity and privacy interests of the person being searched"). Indeed, "[s]uch an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *McNeely*, 133 S. Ct. at 1558 (citation omitted). That is why this Court held in *Schmerber*—and reaffirmed in *McNeely*—that, "absent an emergency," a search warrant is required "'where intrusions into the human body are concerned,' even when the search was

conducted following a lawful arrest." *Ibid.* (citation omitted). *Robinson* did not state a contrary rule.

Indeed, if *Robinson* really stood for the proposition that there are no limits on the search of the body of a person who has been arrested, it would have followed *a fortiori* that the Maryland statute at issue in *King*—which permitted the taking of buccal swabs from individuals taken into custody on suspicion of committing a "serious crime" (see 133 S. Ct. at 1980)—is constitutional. But the Court's decision upholding that law instead cited *Robinson* only in passing (see 133 S. Ct. at 1971, 1974, 1978), instead relying both on considerations unique to "processing [an arrestee] for detention" (*id.* at 1971; see also *id.* at 1974-75)) and on the fact that "[t]he DNA collection [under the Maryland procedure] is not subject to the judgment of officers." *Id.* at 1970. If the decision below in this case is correct, most of the Court's analysis in *King* was beside the point.

4. In addition, as the dissent below recognized, the Minnesota Supreme Court's decision is in obvious tension with the understandings that animated this Court's holding in *McNeely*. The *McNeely* Court expressly disapproved a *per se* rule permitting blood alcohol tests under the exigent circumstances exception to the warrant requirement. 133 S. Ct. at 1563. That holding was a natural application of this Court's determination that "for the most part *per se* rules are inappropriate in the Fourth Amendment context." *United States* v. *Drayton*, 536 U.S. 194, 201 (2002). Yet the defendant in *McNeely* was arrested prior to being subjected to a warrantless blood draw. 133 S. Ct. at 1556-1557. Accordingly, under the Minnesota Supreme Court's rule in this case, the officers in *McNeely* could have avoided the totality-of-the-circumstances inquiry re-

quired by this Court's *McNeely* decision simply by treating the blood test sought there as a search incident to arrest. This approach "nullifies the warrant requirement in nearly every drunk-driving case." *Bernard* Pet. App. 22a. No Justice in *McNeely* even adverted to such a possibility—because, we submit, that approach finds no support in this Court's doctrine.

Moreover, the holding below has disturbing implications that far transcend the impaired-driving context. Searches incident to arrest occur countless times every day across the Nation; in fact, "warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant." *Riley*, 134 S. Ct. at 2482. Yet the court below recognized essentially no discernible limit on the scope of such searches as they are directed at the most intimate feature of the arrestee's body. Such a rule, which finds no support in this Court's doctrine, would sanction unprecedented and insupportable invasions of constitutionally protected privacy.

B. In the DUI context, there is no constitutional distinction between warrantless breath and blood tests.

The court below also attempted to support its holding by pointing to what it described as the "less-invasive nature of breath testing" (*Bernard* Pet. App. 11a n.6), which it contrasted with blood or urine tests. That reasoning, however, rested on a misreading of this Court's precedents that dangerously expands officers' ability to conduct searches inside an arrestee's body.

This Court has explicitly held that breath tests are searches for Fourth Amendment purposes. *Skinner* v. *Ry. Labor Execs.' Ass'n.*, 489 U.S. 602, 616-617 (1989).

See also *McNeely*, 133 S. Ct. at 1569; *King*, 133 S. Ct. at 1969. And although the reduced privacy interests of an arrestee have some bearing on application of the search-incident-to-arrest exception (see *Riley*, 134 S. Ct. at 2488-2489), a breath test of the sort at issue here is "a profound intrusion *into* a person's bodily integrity." *Bernard* Pet. App. 28a (Page & Stras, JJ., dissenting). Such a test does not capture an ordinary exhalation of the kind that routinely is exposed to the public. Instead, it "requires a sample of 'alveolar' (deep lung) air; to assure that such a sample is obtained, the subject is required to blow air into the [breathalyzer] at a constant pressure for a period of several seconds." *California* v. *Trombetta*, 467 U.S. 479, 481 (1984).

The Datamaster, Minnesota's current breath test device, operates in this manner. To obtain a breath sample, an officer must "[i]nsert a mouthpiece and instruct the subject to provide a long and steady sample." David Eden et al., *Datamaster DMT Breath Test Operator Training Course Manual*, Minn. Dep't of Pub. Safety, 51 (Nov. 5, 2013), perma.cc/F6QH-WL6B. The DMT requires at least 1.5 liters of air, provided "in a single exhalation" at a rate of 3.0 liters per minute or greater. *Ibid.* "If the subject stops blowing before the instrument notes a uniformity of concentration (deep lung or alveolar air), the breath sample will not be accepted." *Id.* at 23.[4] Because of the intrusive nature of this testing regime, "[s]ubjecting a person to a

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[4] North Dakota's breath test device, the Intoxilyzer S-D5, works in the same way. Achieving a reliable test requires instructing "the subject to blow steadily into the mouthpiece for as long as possible or until told to stop." Office of Attorney General, Crime Laboratory Division, *ND Intoxilyzer S-D5 (Five) Chemical Test Operator Instructions Using Gas Standards* 4 (2008), perma.cc/-H94L-2KL8.

breathalyzer test, * * * implicates similar concerns about bodily integrity" to those raised by blood tests. *Skinner*, 489 U.S. at 616-617. In terms of its interference with personal privacy and dignity interests, such a test is a very far cry from permissible examination of a "zipper bag," "billfold," "wallet," or "purse." *Riley*, 134 S. Ct. at 2488.

Additionally, "[i]n evaluating the reasonableness of police procedures under the Fourth Amendment," this Court "look[s] to prevailing rules in individual jurisdictions." *Tennessee* v. *Garner*, 471 U.S. 1, 15-16 (1985). The Court thus found it notable in *McNeely* "that a majority of States either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal * * * or prohibit nonconsensual blood tests altogether." *McNeely*, 133 S. Ct. at 1566 & n.9 (plurality opinion). Though not dispositive, the "wide-spread state restrictions on nonconsensual blood testing provide[d] further support for [this Court's] recognition that compelled blood draws implicate a significant privacy interest." *Id.* at 1567. And here as well, nearly all of the States that place restrictions on nonconsensual blood tests impose the same restrictions on nonconsensual breath tests.[5]

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[5] See Ala. Code § 32-5-192(a), (c) (2014); Alaska Stat. §§ 28.35.032(a), 28.35.035(a) (2014); Ariz. Rev. Stat. § 28-1321(D)-(1); Ark. Code §§ 5-65-205(a)(1), 5-65-208(a)(1) (non-relevant amendments enacted by 2015 Arkansas Laws Act 299); Conn. Gen. Stat. §§ 14-227b(b), 14-227c(b) (2014); Ga. Code § 40-5-67.1(d); Haw. Rev. Stat. § 291E-15 (2014); Iowa Code §§ 321J.6(1), 321J.9(1) (2014); Ky. Rev. Stat. § 189A.105(2)(b); La. Rev. Stat. § 32.666(A)(1)(a)(i), (2) (2014); Md. Transp. Code § 16-205.1-(b)(i)(1), (c)(1); Mass. Gen. Laws, ch. 90, § 24(1)(e), (f)(1); Mich. Comp. Laws § 257.625d(1); Miss. Code § 63-11-21; Mont. Code § 61-8-402(4), (5) (2014); Neb. Rev. Stat. § 60-498.01(2); N.H. Rev. Stat. § 265-A:14(I); N.M. Stat. § 66-8-111(A); N.Y. Veh. & Traf.

This provides strong evidence that breath tests, like blood tests, are understood to implicate significant privacy interests.

Against this background, the Court has suggested that warrantless breath tests are *per se* reasonable only "when special needs, *beyond the normal need for law enforcement*, make the warrant and probable-cause requirement impracticable." *Skinner*, 489 U.S. at 619 (emphasis added) (internal quotation marks omitted). And as we explain in more detail in petitioner's brief in *Birchfield* (at 15-18), that exception has no application here.

* * * *

Accordingly, the search-incident-to arrest exception to the warrant requirement cannot support application of Minnesota's compelled-consent requirement in the circumstances of this case. As we also explain in *Birchfield*, the other rationales offered by States in support of compelled-consent statutes are insupportable. See *Birchfield* Pet'r. Br. 20-41. And, as this Court recognized in *Camara*, a person may not be criminally punished for refusing to submit to an unconstitutional search. Under that fundamental principle, petitioner's conviction for criminal test refusal must be set aside.

Law §§ 1194(2)(b)(1), 1194(3); N.D. Code § 39-20-01.1(1); Okla. Stat., Tit. 47, § 753; Ore. Rev. Stat. § 813.100(2); 75 Pa. Cons. Stat. § 1547(b)(1) (2014); R.I. Gen. Laws §§ 31-27-2.1(b), 31–27–2.9(a); S.C. Code § 56-5-2950(B); Tex. Transp. Code §§ 724.012(b), 724.013; Vt. Stat., Tit. 23, § 1202(b), (f); Wash. Rev. Code. § 46.20.308(2)–(4); W. Va. Code §§ 17C-5-4(b), 17C-5-7; Wyo. Stat. § 31-6-102(d).

CONCLUSION

The decision of the Minnesota Supreme Court should be reversed.

Respectfully submitted.

JEFFREY S. SHERIDAN
Sheridan & Dulas, P.A.
320 Eagandale Center
1380 Corporate Center Curve
Eagan, MN 55121
(651) 686-8800

EUGENE R. FIDELL
Yale Law School
*Supreme Court Clinic**
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

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* The representation of petitioner by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

No. 14-1470

In the Supreme Court of the United States

WILLIAM ROBERT BERNARD, JR.,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

On Writ of Certiorari
to The Supreme Court of Minnesota

BRIEF OF RESPONDENT

JAMES C. BACKSTROM
Dakota County Attorney

KATHRYN M. KEENA
Counsel of Record
Assistant Dakota County Attorney

Dakota County Attorney's Office
Judicial Center
1560 Highway 55
Hastings, Minnesota 55033
(651) 438-4438
kathy.keena@co.dakota.mn.us

Counsel for Respondent

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QUESTION PRESENTED

Minnesota law makes it a criminal offense for a driver who has been arrested on probable cause for driving while impaired to refuse to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol. The Minnesota Supreme Court, addressing only breath tests, held that the State may criminalize the driver's refusal to submit to a breath test, even without a warrant. The question presented is:

Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT 1

1. Statement of Facts 2

2. Decisions Below 3

SUMMARY OF ARGUMENT 5

ARGUMENT 7

A. Minnesota's test refusal statute is constitutional as applied to breath tests because a warrantless breath test administered to a suspect lawfully arrested for drunk driving would be permissible pursuant to the search incident to arrest doctrine 8

B. Alternatively, Minnesota's test refusal statute is constitutional as applied to breath tests because a warrantless breath test administered to a suspect lawfully arrested for drunk driving satisfies the general reasonableness requirement of the Fourth Amendment 13

1. Combating Drunk Driving is a Significant Governmental Interest that Implied-Consent and Test-Refusal Laws Effectively Address 14

2. Implied-Consent and Test-Refusal Laws Only Minimally Intrude on Privacy Interests 19

C. Minnesota's refusal statute does not violate the doctrine of unconstitutional conditions.....24

CONCLUSION.....25

TABLE OF AUTHORITIES

Page

Cases

Arizona v. Gant, 556 U.S. 332 (2009)..... 4, 8, 10

Bell v. Wolfish, 441 U.S. 520 (1979).....22

Breithaupt v. Abram, 352 U.S. 432 (1957).....15

Cady v. Dombrowski, 413 U.S. 433 (1973)..... 21

California v. Carney, 471 U.S. 386 (1985).....21

Chimel v. California, 395 U.S. 752 (1969)...8-9, 10, 11

County of Riverside v. McLaughlin,
500 U.S. 44 (1991).....22

Cupp v. Murphy, 412 U.S. 291 (1973)..... 13

Espinoza v. United States,
278 F.2d 802 (5th Cir. 1960)..... 13

Florence v. Bd. of Chosen Freeholders of Cty. of Burlington, 132 S.Ct. 1510 (2012).....22

Giannopoulos v. Dep't of Transp., Bureau of Driver Licensing, 82 A.3d 1092 (Pa. Commw. Ct. 2013)..... 21

Griffin v. Wisconsin, 483 U.S. 868 (1987).....22

Illinois v. McArthur, 531 U.S. 326 (2001).....14

Jones v. State,
74 A.2d 802 (Md. Ct. Spec. App. 2013).....12-13

Katz v. United States, 389 U.S. 347 (1967).....8

Mackey v. Montrym, 443 U.S. 1 (1979)..... 16, 17

Cases – continued

Maryland v. King, 133 S. Ct. 1958 (2013)..... ***passim***

Mich. Dep't of State Police v. Sitz,
496 U.S. 444 (1990).....15

Missouri v. McNeely, 133 S. Ct. 1552 (2013).... ***passim***

Mullins v. State, 646 N.E.2d 40 (1995).....21

National Treasury Employees Union v. Von Raab,
489 U.S. 656 (1989)..... 19

New York v. Belton, 453 U.S. 454 (1981).....10

Perez v. Campbell, 402 U.S. 637 (1971)..... 16

Riley v. California, 134 S. Ct. 2473 (2014)..... 4, 10, 11

Samson v. California, 547 U.S. 843 (2006).....14

Schmerber v. California, 384 U.S. 757 (1966).... 12, 13

Skinner v. Railway Labor Executives' Ass'n,
489 U.S. 602 (1989)..... *passim*

South Dakota v. Neville, 459 U.S. 553 (1983).....15, 18

South Dakota v. Opperman, 428 U.S. 364 (1976).....21

State v. Wiseman, 816 N.W.2d 689, 696 (Minn. Ct. App. 2012), *review denied* (Minn. Sept. 25, 2012), *cert. denied* 133 S. Ct. 1585 (2013)..... 18

Terry v. Ohio, 392 U.S. 1 (1968).....22

United States v. D'Amico,
408 F.2d 331 (2d Cir. 1969)..... 13

Cases – continued

United States v. Edwards, 415 U.S. 800 (1974)..... 22

United States v. Jacobsen, 466 U.S. 109 (1984)..... 21

United States v. Johnson,
445 F.3d 793 (5th Cir. 2006).....12

United States v. Knights, 534 U.S. 112 (2001)... 14, 22

United States v. Place, 462 U.S. 696 (1983).....21

United States v. Robinson,
414 U.S. 218 (1973)..... *passim*

Vernonia Sch. Dist. 47J v. Acton,
515 U.S. 646 (1995).....8

Wyoming v. Houghton, 526 U.S. 295 (1999).....14

Statutes

1989 Minn. Laws 1658.....1-2

1961 Minn. Laws 713.....1

1971 Minn. Laws 1811.....1

1976 Minn. Laws 1357.....1

1992 Minn. Laws 1947.....2

2004 Minn. Laws 1244.....1

Minn. Stat. § 169A.20, subd. 2 and subd. 1(1)-(2).....3

Minn. Stat. § 169A.276, subd. 1(a).....3

Minn. Stat. § 169A.51, subd. 2(a)(4) (2014).....22-23

Minn. Stat. § 169A.51, subd. 5(a) (2014).....20

Statutes - continued

Minn. Stat. § 171.306, subd. 3.....20

Miscellaneous Sources

Ralph K. Jones & James L. Nichols, *Breath Test Refusals and Their Effect on DWI Prosecution* 42 (2012)..... 16

Ester Namuswe, et al., *Breath Test Refusal Rates in the United States – 2011 Update*, (March 2014)..... 2

H.L. Ross, et al., *Causes and Consequences of Implied Consent Test Refusal*, 11 Alcohol, Drugs and Driving 57, 71-72 (1995)..... 2, 16

David Eden et al., *Datamaster DMT Breath Test Operator Training Course Manual*, Minn. Dep't of Pub. Safety (Sept. 8, 2015).....20

Robert Voas et al., *Implied Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, J Safety Res; 40(2): 77-83 (2009)..... 16

Minnesota Department of Public Safety, *Minnesota Ignition Interlock Device Program – Program Guidelines* (July 2015), https://dps.mn.gov/divisions/dvs/programs/mn-ignition-interlock/Documents/Ignition-Interlock-ProgramGuidelines.pdf.....20

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STATEMENT

Recognizing the terrible toll drunk drivers exact on society, Minnesota enacted its implied consent law in 1961. The purpose of the legislation was two-fold. First, it conditioned the privilege of driving a motor vehicle on a public road on the driver's consent to chemical testing upon arrest. Second, it allowed a suspected drunk driver to withdraw consent, but imposed administrative license sanctions for refusing to test. 1961 Minn. Laws 713. One of the rationales for penalizing test refusal was to prevent the violent confrontations associated with forced blood draws.

Later, many states, including Minnesota, enacted *per se* drunk driving laws under which prosecutors no longer had to prove actual impairment, but could rely instead on a presumption of intoxication at a certain blood alcohol content (BAC) level. Minnesota passed such a law in 1971, which defined a BAC of 0.10% to be illegal *per se*. 1971 Minn. Laws 1811. Five years later, Minnesota was the first state to impose administrative license sanctions for those drunk drivers who were found to have a BAC of 0.10% or higher. 1976 Minn. Laws 1357. By 2004, Minnesota, along with all other 50 states, lowered the *per se* BAC level to 0.08%. 2004 Minn. Laws 1244.

The State could effectively enforce its *per se* statutes only by regularly determining drunk drivers' BAC. The State therefore had to encourage drivers suspected of drunk driving to submit to chemical testing. Towards that end, Minnesota made it illegal for repeat offenders suspected of drunk driving to refuse to submit to chemical testing. 1989 Minn. Laws 1658. Effective January 1, 1993, the Minnesota Legislature expanded the law and made test refusal a

crime for *any* suspected drunk driver who refused chemical testing. 1992 Minn. Laws 1947.

Minnesota's test refusal statute has proven to be an effective tool. The initial version of the law, applicable only to repeat offenders, lowered the State's refusal rate from 24.3% in 1988 to 22.4% in 1991. H.L. Ross, et al., *Causes and Consequences of Implied Consent Test Refusal*, 11 Alcohol, Drugs and Driving 57, 71-72 (1995). When the State expanded the law to all suspected drunk drivers, the impact was far more dramatic — Minnesota experienced a 50% reduction in its refusal rate. *Id.* This trend has continued. According to the National Highway Traffic Safety Administration, in 2011, the national average BAC test refusal rate (based on data from thirty-four states) was 24% — Minnesota's refusal rate was 12%. Ester Namuswe, et al., *Breath Test Refusal Rates in the United States – 2011 Update*, (March 2014). It is this effective tool that is the subject of this appeal.

A. Statement of Facts.

The underlying facts of this case are undisputed. On August 5, 2012, in Dakota County, Minnesota, police officers received a report of three intoxicated males attempting to extract a boat out of the water with a truck. At approximately 7:00 p.m., officers were dispatched to a Department of Natural Resources boat launch to investigate; they were told that the truck had become stuck in the process.

Upon their arrival, a witness directed them to three men who appeared to be drunk, situated near a truck stuck on the edge of the boat launch. The officers went up to them and smelled alcohol. The men all denied driving the truck, but two witnesses identified the driver of the truck as the man wearing

solely his underwear, who was later identified as Petitioner William Bernard. A witness also advised officers that Petitioner was stumbling as he walked from the boat to the truck.

The officers walked up to Petitioner and smelled a strong odor of alcohol on his breath and saw that his eyes were bloodshot and watery. Petitioner admitted to drinking alcohol but denied driving the truck even though the officers located the keys to the vehicle in his hand. The officers asked Petitioner to perform field sobriety tests but he refused. At that point, they arrested Petitioner and transported him to the South St. Paul Police Department where he was read the Minnesota Implied Consent Advisory. They then asked Petitioner to take a breath test; he refused stating, "I have no reason to take one."

Because Petitioner had a prior felony impaired driving conviction, the State charged him with two counts of First-Degree Driving While Impaired—Test Refusal in violation of Minn. Stat. §§ 169A.20, subd. 2; subd. 1(1)-(2) and 169A.276, subd. 1(a).

B. The decisions below.

The Dakota County District Court held that the officer had probable cause to arrest Petitioner, but ruled that the State's implied consent law violated the Fourth Amendment. Pet. App. 47a-61a. The Minnesota Court of Appeals reversed, holding that it was "constitutionally reasonable" for an officer to "giv[e] Bernard the choice to voluntarily submit to warrantless testing" when the officer, based on probable cause, could have obtained a search warrant. Pet. App. 43a.

The Minnesota Supreme Court affirmed on different grounds. Pet. App. 1a-22a. The court

concluded that "charging [Petitioner] with criminal test refusal does not implicate a fundamental right" because the officers "could have conducted a warrantless search of [Petitioner's] breath as a search incident to a valid arrest." Pet. App. 3a, 7a. The court explained that *United States v. Robinson*, 414 U.S. 218, 235 (1973), held that "the police are authorized to conduct a 'full search of the person' who has been lawfully arrested," and that both its decisions and those of other courts around the nation have "allowed searches of the body beyond a pat down." Pet. App. 8a; *see also id.* at 8a-9a & n.6 (citing cases).

After pointing to several other courts that have upheld breath tests as searches incident to arrest, the Minnesota Supreme Court stated that its "research has not revealed a single case anywhere in the country that holds that a warrantless breath test is not permissible under the search-incident-to-a-valid-arrest exception." Pet. App. 10a. The court rejected Petitioner's contention that *Arizona v. Gant*, 556 U.S. 332 (2009), and *Riley v. California*, 134 S. Ct. 2473 (2014), "retract[ed] the scope of searches" of the person authorized by *Robinson*'s categorical rule. Pet. App. 11a-17a. The Court explained that *Gant* "did not address a search of a person," *id.* at 11a; and *Riley* "reaffirmed *Robinson*'s holding that 'searches of a person' are lawful as part of a search incident to arrest without any additional showing by the government." *Id.* at 15a n.8 (quoting *Riley*, 134 S. Ct. at 2485).

SUMMARY OF ARGUMENT

The Fourth Amendment provides that persons have the right to be secure in their persons against unreasonable searches and seizures. The Fourth Amendment is applicable to the collection of breath, urine or blood from a person lawfully arrested for driving while impaired; however, that only begins the inquiry into the standards governing such intrusions. While a warrantless search is generally unreasonable, this Court has recognized several exceptions to the warrant requirement. One of those well-recognized exceptions is a search incident to lawful arrest as articulated by this Court in *Robinson*. In *Robinson*, this Court created a categorical rule holding that police officers are authorized to conduct a full search of a person who has been lawfully arrested. The Minnesota Supreme Court correctly applied the bright-line rule of *Robinson* and held that a warrantless breath test of a suspect lawfully arrested for driving while impaired does not violate the Fourth Amendment because it is a search incident to arrest. Accordingly, because a police officer could compel a suspect to submit to a breath test, it does not violate the Fourth Amendment to criminally charge the suspect for refusing to take the test.

Alternatively, a warrantless breath test is permissible because it satisfies the general reasonableness requirement of the Fourth Amendment. The Fourth Amendment is not a guarantee against all searches and seizures – only unreasonable ones. The application of traditional standards of reasonableness requires this Court to weigh the promotion of legitimate governmental

interests against the degree to which the search intrudes upon an individual's privacy.

This Court has long recognized the government's interest in protecting lives and securing the safety of its public roads by prosecuting drivers who elect to drive drunk. In comparison, a person who chooses to drive drunk has diminished expectations of privacy because the person is participating in the highly regulated activity of operating a motor vehicle on a public road. If arrested, the person's expectation of privacy is further diminished by being in police custody. As to the breath test itself, it is minimally intrusive and its administration does not implicate significant privacy concerns because a breath test reveals no other facts except the level of alcohol in the person's bloodstream.

The government's compelling interest in eradicating drunk driving far outweighs the small intrusion on drunk drivers' privacy. A warrantless breath test is therefore reasonable under the Fourth Amendment. And because a police officer could compel a suspect to submit to a breath test, it does not violate the Fourth Amendment to criminally charge the suspect for refusing to take the test.

ARGUMENT

This Court has long recognized that States have a legitimate interest in eradicating drunk driving to protect lives and secure the safety of public roads. One of the tools the Court has endorsed in this effort is implied-consent and test-refusal laws that (1) condition driving on state roads on a person's consent to submit to a chemical test if he is arrested on suspicion of drunk driving, and (2) impose significant consequences for revoking that consent. Some states, such as Minnesota and North Dakota, impose criminal sanctions if a person withdraws his consent. Petitioner asserts that Minnesota's implied consent statute violates his Fourth Amendment right to refuse a warrantless search. His argument fails for the reasons articulated by the State of North Dakota in its brief on the merits in *Birchfield*.

His argument also fails for reasons distinct to this case. Whereas *Birchfield* involves refusal to submit to a *blood* test, this case involves refusal to submit to the less-intrusive *breath* test. Warrantless breath tests are permissible under the Fourth Amendment for two independent reasons: under the search incident to arrest doctrine and because, in this context, they satisfy the general reasonableness requirements of the Fourth Amendment. That resolves this case. As Petitioner does not appear to dispute, if the State may compel a person to submit to a warrantless breath test, it has the associated power to impose a criminal sanction for refusing to take the test.

A. Minnesota's test refusal statute is constitutional as applied to breath tests because a warrantless breath test administered to a suspect lawfully arrested for drunk driving would be permissible pursuant to the search incident to arrest doctrine.

The Fourth Amendment, binding on the States by the Fourteenth Amendment, provides that persons have the right to be secure in their persons, houses, papers and effects, against "unreasonable searches and seizures." The ultimate touchstone of the Fourth Amendment, therefore, is reasonableness. *See Maryland v. King*, 133 S.Ct. 1958, 1968 (2013) (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995)).

A warrantless search is generally unreasonable unless it falls into one of the recognized exceptions to the warrant requirement. *Gant*, 556 U.S. at 338 (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). One of those well-recognized exceptions is a search incident to a lawful arrest. *Gant*, 556 U.S. at 338 (citation omitted). This exception dates back to the founding, when "[a]nyone arrested could expect that not only his surface clothing, but his body, luggage, and saddlebags would be searched and, perhaps, his shoes, socks, and mouth as well." William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791*, at 420, 751 (2009).

The modern day groundwork for the search incident to arrest doctrine was fashioned by this Court in *Chimel v. California*, 395 U.S. 752 (1969). Under *Chimel*, police may search incident to arrest

the area within an arrestee's "immediate control," meaning "the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763. The Court justified the exception on two grounds: officer safety and to prevent the "concealment or destruction of evidence." *Id.*

Four years later, in *United States v. Robinson*, 414 U.S. 218 (1973), the Court adopted the bright-line rule that police officers may, without a warrant, always conduct a full search of a person who has been lawfully arrested. *Id.* at 235. The Court specifically rejected the proposition that "case-by-case adjudication" was required to determine "whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *Id.* Instead, the Court concluded that the arrest of a person based on probable cause is a "reasonable intrusion under the Fourth Amendment" and that "a search incident to arrest requires no additional justification." Accordingly, the arresting officer need not have a specific concern about the loss of evidence or that the person might be armed. *Id.*

In this case, the Minnesota Supreme Court relied on the categorical rule articulated in *Robinson* and held that a warrantless breath test of a suspect lawfully arrested for driving while impaired does not violate the Fourth Amendment because it is a search incident to lawful arrest. Pet. App. 8a-9a. Thus, reasoned the court, because a police officer could compel a suspect to submit to a breath test, it does not violate the Fourth Amendment to criminally charge the suspect for refusing to take the test. That decision faithfully applied this Court's Fourth Amendment jurisprudence. Petitioner levies several objections to the Minnesota court's holding, but none has merit.

First, Petitioner contends (Pet'r Br. 15-20) that this Court effectively overruled *Robinson* in *Arizona v. Gant*, 556 U.S. 332 (2009), and *Riley v. California*, 134 S. Ct. 2473 (2014). It did no such thing. *Gant* sought to resolve confusion stemming from *Chimel*'s holding that a search incident to arrest may include not only a search of the person, but also of "the area 'within his immediate control'." *Chimel*, 395 U.S. at 763. In *New York v. Belton*, 453 U.S. 454, 460 (1981), the Court granted certiorari because "courts ha[d] found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile." *Gant* simply revisited that question. Its holding did not purport to address searches *of the person*; and it certainly did not call into question the longstanding categorical right to search persons incident to lawful arrests.

Indeed, in *McNeely* — decided several years after *Gant* — this Court reiterated the categorical nature of the *Robinson* rule when differentiating the exigent circumstances exception from the search incident to arrest rule. The Court explained that it has "recognized a limited class of traditional exceptions to the warrant requirement that apply categorically and thus do not require an assessment of whether the policy justifications underlying the exception . . are implicated in a particular case" — and cited *Robinson* as one example. *Missouri v. McNeely*, 133 S.Ct. 1552, 1559 n.3 (2013) (citing *Robinson*, 414 U.S. at 224-35); *see also King*, 133 S.Ct. at 1970-71 (describing categorical nature of search incident to arrest rule).

Nor did *Riley v. California* cast doubt on officers' categorical right to search the person upon a lawful arrest. The Court did not question the *per se*

rule adopted in *Robinson* allowing "searches of a person" and even searches of "physical objects" found on persons. *Riley*, 134 S.Ct. at 2483-85. Rather, the Court simply "decline[d] to *extend Robinson* to searches of data on cell phones," which "bear[] little resemblance to the type of brief physical search considered in *Robinson*." *Id.* at 2485 (emphasis added). And that was because "[c]ell phones differ in both a quantitative and qualitative sense from other objects that might be kept on an arrestee's person." *Id.* at 2478. As described in § B(2), *infra*, that concern has no application with respect to breath tests.

Second, Petitioner contends (seemingly in the alternative) that the Court should carve out breath tests from the categorical *Robinson* rule because "it is a category of searches that can have no connection to the *Chimel* justifications." Pet'r Br. 21. That request contradicts the *per se* nature of the *Robinson* rule, whose underlying premise was that an arrest based upon probable cause "being lawful, a search incident to arrest requires no additional justification." *Robinson*, 414 U.S. at 235. Category-of-evidence by category-of-evidence adjudication is no more consistent with that principle than the "case-by-case adjudication" *Robinson* expressly rejected. *Id.*

On top of that, Petitioner's premise is wrong: breath tests plainly further the *Chimel* justification in preventing the destruction of evidence. Although *McNeely* held that the dissipation of alcohol in the blood is not so rapid as to *always* implicate the exigency exception, the Court did not dispute that "as a result of the human body's natural metabolic processes, the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed and continues to decline until the alcohol is eliminated."

McNeely, 133 S.Ct. at 1560. For that reason, "a significant delay in testing will negatively affect the probative value of the results." *Id.* at 1561. The contention that breath tests do not further the search-incident-to-arrest objective of preventing the destruction of evidence cannot be credited.

Third, Petitioner argues that *McNeely* and *Schmerber v. California*, 384 U.S. 757 (1966), already established that breath tests are not properly part of a search incident to arrest. Pet'r Br. 15 (asserting that applying search incident to arrest doctrine here would "read[] this Court's *McNeely* decision off the books"); 19 (quoting *Schmerber*). But, of course, both of those decisions involved blood tests, not breath tests. Once again, Petitioner is relying on cases that did not address the issue presented here.

Fourth and relatedly, Petitioner maintains that "there is no constitutional distinction between warrantless breath and blood tests." Pet'r Br. 23. To the contrary, the Minnesota Supreme Court quite sensibly drew a line between those two types of tests, holding that only the former may be given under the search incident to arrest doctrine. Pet. App. 10a-11a n.6. This Court explained in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 625 (1989), that "[u]nlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment."

Although this Court has never faced the issue, courts around the nation have never understood the search incident to arrest doctrine as excluding obtaining biological evidence from the body. Courts have upheld testing arrestees' hands for gunpowder residue, *see United States v. Johnson*, 445 F.3d 793, 795-96 (5th Cir. 2006); *Jones v. State*, 74 A.2d 802,

812-13 (Md. Ct. Spec. App. 2013); obtaining strands of arrestees' hair, *see United States v. D'Amico*, 408 F.2d 331, 332-33 (2d Cir. 1969); and searching an arrestee's mouth for narcotics, *see Espinoza v. United States*, 278 F.2d 802, 804 (5th Cir. 1960). Further, in *Cupp v. Murphy*, 412 U.S. 291, 295 (1973), a pre-*Robinson* opinion, this Court held that scraping a defendant's fingernails for evidence was constitutionally permissible under the search incident to arrest doctrine.

All told, requiring a person lawfully arrested on suspicion of drunk driving to breathe into a breathalyzer falls comfortably within the search incident to arrest doctrine. For that reason, Minnesota's test refusal statute is constitutional as applied to breath tests.

B. Alternatively, Minnesota's test refusal statute is constitutional as applied to breath tests because a warrantless breath test administered to a suspect lawfully arrested for drunk driving satisfies the general reasonableness requirement of the Fourth Amendment.

The proper function of the Fourth Amendment is not to constrain all intrusions, but only those "'which are not justified in the circumstances, or which are made in an improper manner.'" *King*, 133 S.Ct. at 1969 (quoting *Schmerber*, 384 U.S. at 768). Thus, the Fourth Amendment is not a guarantee against all searches and seizures — only those that are unreasonable. And as to certain categories of warrantless searches, "'rather than employing a *per se* rule of unreasonableness, [this Court] balance[s]

the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable.'" *Id.* at 1970 (quoting *Illinois v. McArthur*, 531 U.S. 326, 331 (2001)).

The Court most recently conducted that analysis in *Maryland v. King* and *Samson v. California*, 547 U.S. 843, 848 (2006). In *Samson*, the Court explained that, to determine whether a search is reasonable, the Court balances the interests at stake by examining the "totality of the circumstances." 547 U.S. at 848 (citing *United States v. Knights*, 534 U.S. 112, 118 (2001)). Whether a search is reasonable "requires a court to weigh 'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy.'" *King*, 133 S. Ct. at 1970 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). Here, as in *King* and *Samson*, the governmental interest significantly outweighs the minimal privacy intrusion of blowing into a breath-testing instrument for the small category of individuals who are arrested on probable cause for driving while impaired, having driven on Minnesota roads subject to the condition that they consent to a chemical test should they ever be arrested for drunk driving.

1. Combating Drunk Driving is a Significant Governmental Interest that Implied-Consent and Test-Refusal Laws Effectively Address.

It is undisputed that States have a paramount interest in eradicating drunk driving to protect lives and secure the safety of public roads. According to the National Highway Traffic Safety Administration

(NHTSA), in 2012, more than 10,000 people died in alcohol-impaired driving crashes — one person every 51 minutes. NHTSA also estimates that alcohol-impaired motor vehicle crashes cost an estimated $37 billion per year. NHTSA, http://www.nhtsa.gov/Impaired.

This Court has long recognized the costs of drunk driving as a substantial and compelling governmental interest. Starting as early as 1957, when addressing the constitutionality of a blood draw from an unconscious drunk driver who was responsible for the deaths of three people, the Court noted "[t]he increasing slaughter on our highways" caused by drunk drivers and that the deaths caused by drunk drivers had reached "astounding figures only heard of on the battlefield." *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957). In *Breithaupt*, this Court also recognized the importance of the government's efforts "through safety measures, modern scientific methods, and strict enforcement of traffic laws" to combat drunk driving. *Id.*

In subsequent cases, this Court continued to recognize drunk driving as a significant public safety risk and that States have a compelling interest in eradicating that risk from its public roads. The Court recently reiterated this in *McNeely*, noting the "terrible toll" drunk driving exacts on our society. *McNeely*, 133 S.Ct. at 1565. *See also Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it"); *South Dakota v. Neville*, 459 U.S. 553, 558 (1983) ("The situation underlying this case — that of the drunk driver — occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed

recitation here"); *Mackey v. Montrym*, 443 U.S. 1, 19 (1979) (recognizing the "compelling interest in highway safety"); *Perez v. Campbell*, 402 U.S. 637, 657 (1971) (Blackmun, J., concurring) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars").

Minnesota's implied consent law, including its criminalization of test refusal, is one of many effective tools the State uses to deter drivers from driving under the influence and to encourage them to submit to testing if lawfully arrested for doing so. One study concluded that alcohol concentration test refusals compromise the enforcement of drunk-driving laws. Pet. App. 21a (citing Ralph K. Jones & James L. Nichols, *Breath Test Refusals and Their Effect on DWI Prosecution* 42 (2012) (concluding that "[a]s statewide refusal rates increased, overall conviction rates . . . decreased")). Another study found that "Minnesota's test refusal statute has led to a lower refusal rate and an increased conviction rate for alcohol-related offenses, including driving under the influence and test refusal." Pet. App. 21a-22a (citing H.L. Ross, et al., *Causes and Consequences of Implied Consent Test Refusal*, 11 Alcohol, Drugs and Driving 57, 71-72 (1995)). Still another study noted that the United States has been "left with a relatively weak procedure for requiring DUI suspects to participate in a BAC test compared to the rest of the industrialized world where most countries have criminalized test refusal." Robert Voas et al., *Implied Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, J Safety Res; 40(2): 77-83 (2009). Dr. Voas noted that the "refusal problem is growing and that it seriously interferes with the prosecution of DUI offenders." *Id.*

Similarly, as discussed *supra*, this Court in *McNeely* endorsed the use of implied consent laws — just as it has done many times before. *McNeely* explained that its holding does not "undermine the governmental interest in preventing and prosecuting drunk-driving offenses" because "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." *McNeely*, 133 S. Ct. at 1566. "For example," stated the Court, "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked[.]" *Id.* (internal citations omitted). Likewise, in addressing an administrative penalty under Massachusetts' implied consent law for refusing to take a breath test, this Court in *Mackey* recognized that the penalty substantially served the governmental interest because it serves as a deterrent to drunk driving, provides an inducement to take a breath test, and removes licensed drivers from the road who are arrested for drunk driving and refuse to take the test. *Mackey*, 443 U.S. at 2.

Test refusal statutes also prevent the type of violent confrontation that occurred in *McNeely* [1] In

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[1] There is a significant factual difference between this case and what occurred in *McNeely*. The search in *McNeely* was substantially more intrusive having involved the forcible taking of a blood sample against the defendant's will. In contrast, this case involved Petitioner's voluntary refusal to take a minimally intrusive breath test after being advised of his rights under the implied consent law. Petitioner's refusal to take a breath test

Neville, this Court recognized that a penalty for test refusal serves the important governmental interest of avoiding "violent confrontations" associated with blood alcohol draws. *Neville*, 459 U.S. at 559. Minnesota has long recognized this as a significant governmental interest, having enacted its implied consent law in 1961 for that very reason. 1961 Minn. Laws 713. The purpose of the statute was two-fold: (1) it provided that consent to chemical testing is implied by driving a motor vehicle; and (2) it allowed a person to withdraw consent, but imposed license sanctions for test refusal.

As a practical matter, it is impossible to administer a breath or urine test without a suspect's cooperation. Consequently, if a suspect refuses a breath test — as he is more likely to do if the statutory sanctions are lifted — police officers would be required to obtain search warrants for forced blood draws, which are significantly more intrusive in nature than breath tests and create a public safety risk. *See State v. Wiseman*, 816 N.W.2d 689, 696 (Minn. Ct. App. 2012), *review denied* (Minn. Sept. 25, 2012), *cert. denied* 133 S. Ct. 1585 (2013), *abrogated in part by Missouri v. McNeely*, 133 S. Ct. 1552 (finding that forcible blood draws are a public safety risk because they can result "in injury to a police officer, medical personnel or [the defendant]"). Such a regime would undermine what this Court encouraged in *McNeely* — the use of implied consent laws to prevent the violent confrontations associated with forced blood draws.

Finally, the implied consent law is carefully tailored to meet the government's interest in

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was honored and no testing of any kind was conducted. Instead, Petitioner was criminally charged under the refusal statute.

combating drunk driving. The law only allows a police officer to request a breath test from a suspect after the officer has probable cause to believe the suspect is driving while impaired. Accordingly, the law applies only to a very narrow subset of drivers on the road — a subset that the government has a great interest in obtaining a breath test from because it has good reason to believe they are driving drunk. In this, the statute compares favorably (in terms of both being more limited as to whom it applies and in terms of being more critical to a government interest) to the programs upheld in *Von Raab* and *Skinner*, which involved chemical testing without that level of individual suspicion. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner*, 489 U.S. 602.

2. Implied-Consent and Test-Refusal Laws Only Minimally Intrude on Privacy Interests.

In contrast to the substantial governmental interest in prosecuting individuals who choose to drive while impaired, a breath test's intrusion on the privacy of a person arrested on probable cause for drunk driving is minor.

First, a breath test is minimally intrusive. "The fact that an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search as the law defines that term." *King*, 133 S.Ct. at 1969 (finding that a buccal swab is minimally intrusive in comparison to drawing blood because it requires no surgical intrusions beneath the skin). And as noted in § (A), *supra*, this Court in *Skinner* specifically found that the administration of a breath test is less intrusive than a blood test. *Skinner*, 489 U.S. at 625 ("Unlike blood tests, breath

tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment").

The breath test instrument used throughout Minnesota is the Datamaster DMT-G ("DMT"). David Eden et al., *Datamaster DMT Breath Test Operator Training Course Manual*, Minn. Dep't of Pub. Safety (Sept. 8, 2015). How a breath test result is to be obtained is carefully spelled out in the state's implied consent law. For a DMT, the test consists of one adequate breath sample, one calibration standard analysis, and a second adequate breath sample analysis. Minn. Stat. § 169A.51, subd. 5(a) (2014). The suspect has up to three minutes per sample to provide an adequate breath sample. Eden et al., *supra*. The breath test itself simply requires the suspect to blow into a straw-like mouthpiece attached to the end of a tube that is connected to the DMT. *Id.* Obtaining an adequate sample generally only requires the suspect to continuously blow into the mouthpiece anywhere from four to fifteen seconds.[2]

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[2] Blowing into a DMT is no different than blowing into an ignition interlock device. In Minnesota, certain alcohol offenders have the option of regaining their driving privileges by participating in the Minnesota Ignition Interlock Device Program. Minn. Stat. § 171.306, subd. 3. The device is equipped with a camera and installed near the steering wheel and connected to the vehicle's engine. The driver is required to blow into the device to determine the driver's alcohol concentration. A photo is taken at the same time. If alcohol is detected, the vehicle will not start and the Minnesota Department of Vehicle Services is notified of the violation. Minnesota Department of Public Safety, *Minnesota Ignition Interlock Device Program – Program Guidelines* (July 2015), https://dps.mn.gov/divisions/dvs/programs/mn-ignition-interlock/Documents/Ignition-Interlock-ProgramGuidelines.pdf

See, e.g., Giannopoulos v. Dep't of Transp., Bureau of Driver Licensing, 82 A.3d 1092 (Pa. Commw. Ct. 2013); *Mullins v. State*, 646 N.E.2d 40 (1995).

Second, the administration of a breath test does not implicate significant privacy concerns because unlike a blood draw or a buccal swab for DNA, breath tests "reveal the level of alcohol in [a person's] bloodstream and nothing more." *Skinner*, 489 U.S. at 625. Breath tests reveal no other facts in which the suspect has a substantial privacy interest. *Id.* at 626 (citing *United States v. Jacobsen*, 466 U.S. 109, 123 (1984) ("A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy"); *United States v. Place*, 462 U.S. 696, 707 (1983) (the "limited disclosure" of a dog sniff that detects only contraband "ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods").

Third, a driver's expectation of privacy is diminished because the driver is on notice of potential police intrusion when taking part in the highly regulated activity of operating a motor vehicle on a public roadway. All States require motor vehicles to be registered and drivers to be licensed. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). All States have enacted extensive and detailed traffic codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways. *Id.* Drivers are well aware that police stops of vehicles are an everyday occurrence. *California v. Carney*, 471 U.S. 386, 392 (1985) (citing *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976)).

Fourth, the only individuals whose privacy is at issue have already been arrested for driving while impaired — and as this Court has explained, "[t]he expectations of privacy of an individual taken into police custody 'necessarily [are] of a diminished scope.'" *King*, 133 S.Ct. at 1978 (quoting *Bell v. Wolfish*, 441 U.S. 520, 557 (1979)). By definition, an arrestee "do[es] not enjoy 'the absolute liberty to which every citizen is entitled.'" *Knights*, 534 U.S. at 119 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)). "An arrest is the initial stage of a criminal prosecution" and is "inevitably accompanied by future interference with the individual's freedom of movement." *Terry v. Ohio*, 392 U.S. 1, 26 (1968).

An arrestee is also subject to other serious restrictions and intrusions. Both the arrestee's person and the property in his immediate possession may be searched at the jail. *United States v. Edwards*, 415 U.S. 800, 803 (1974). A search of the arrestee's person may involve a relatively extensive exploration, including requiring the arrestee to lift his genitals or cough in a squatting position. *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 132 S.Ct. 1510, 1520 (2012). The arrestee is subject to booking procedures, including photographing and fingerprinting and, in some states, DNA testing. *King*, 133 S.Ct. 1958. An arrestee may be confined in jail pending appearance before a judicial officer. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). If charged, the arrestee may be subject to further restrictions, including continued detention or release from jail upon bail and/or conditions or release.

Furthermore, before deciding whether to submit to chemical testing, the suspect has the right to first consult with an attorney. Minn. Stat. §

169A.51, subd. 2(a)(4) (2014). The suspect has the opportunity to discuss the facts of his case with his attorney and seek advice as to whether to submit to chemical testing.

On top of all that, a neutral magistrate will review the officer's probable cause determination before any criminal penalty is imposed. If police officers make contact without reason, fail to articulate sufficient probable cause for the arrest, or fail to vindicate the suspect's right to counsel prior to reading the implied consent advisory, the suspect may challenge the refusal charge at an evidentiary hearing before a magistrate. If the State is unable to meet its burden, the magistrate will dismiss the refusal charge as well as any associated drunk driving charges. Petitioner's concern that the State's laws cast neutral magistrates out of the picture is therefore misplaced.

Finally, under Minnesota's implied consent law, the circumstances justifying alcohol testing are narrowly defined. There are virtually no facts for a magistrate to evaluate in a standard drunk driving case where the driver exhibits illegal or suspicious driving conduct and displays signs of impairment during the interaction. As in *Skinner*, obtaining thousands of "boiler-plate" search warrants in routine driving while impaired cases in place of the implied consent law would add little to the assurances of regularity already afforded by the statutes. It would, however, frustrate achieving the State's compelling interest in enforcing drunk driving laws to keep the driving public safe. *Skinner*, 489 U.S. at 623-24.

* * * * *

In the end, given the diminished expectation of privacy of persons driving while impaired *and* of persons arrested, and the minimal invasiveness of a

breath test, the outcome of weighing is plain: the government's compelling interest in eradicating drunk driving far outweighs the small intrusion on drunk drivers' privacy. A warrantless breath test is therefore reasonable under the Fourth Amendment. And (once again) because a police officer could compel a suspect to submit to a breath test, the State may criminally charge the suspect for refusing to take that test.

C. Minnesota's refusal statute does not violate the doctrine of unconstitutional conditions.

Petitioner argued to the Minnesota Supreme Court that Minnesota's refusal statute violates the unconstitutional conditions doctrine because it compels a person to relinquish his Fourth Amendment right to be free from an unreasonable search and seizure as a condition of maintaining his driving privileges. To avoid repetition, with respect to Petitioner's unconstitutional conditions argument, the State of Minnesota relies upon the arguments made by the State of North Dakota in its brief on the merits in *Birchfield*.

CONCLUSION

The decision of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

James C. Backstrom
Dakota County Attorney
Dakota County Attorney's Office
Judicial Center
1560 Hwy. 55
Hastings, MN 55033
(651) 438-4438

Kathryn M. Keena
Counsel of Record
Dakota County Attorney's Office
Judicial Center
1560 Hwy. 55
Hastings, MN 55033
(651) 438-4438
kathy.keena@co.dakota.mn.us

Counsel for Respondent

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No. 14-1470

In the Supreme Court of the United States

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Writ of Certiorari to The Supreme Court of Minnesota

REPLY BRIEF FOR PETITIONER

JEFFREY S. SHERIDAN
Sheridan & Dulas, P.A.
320 Eagandale Center
1380 Corporate Center Curve
Eagan, MN 55121
(651) 686-8800

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

TABLE OF CONTENTS

Table of Authorities ii

A. Minnesota cannot justify its warrantless chemical breath tests under the search-incident-to-arrest doctrine. 1

1. *Robinson* does not state a special rule applicable to searches inside the body 1

2. Chemical BAC tests do not implicate the *Chimel* rationales. 4

B. Warrantless breath tests cannot be upheld on a theory of "general reasonableness." 6

Conclusion 11

TABLE OF AUTHORITIES

Arizona v. *Gant*,
556 U.S. 332 (2009) 2, 7

Bell v. *Wolfish*,
441 U.S. 520 (1979) 8

Chimel v. *California*,
395 U.S. 752 (1969) 2, 4, 6

Florence v. *Bd. of Chosen Freeholders of Cty. of Burlington*, 132 S. Ct. 1510 (2012) 4, 8

Illinois v. *Lafayette*,
462 U.S. 640 (1983) 4

Katz v. *United States*,
389 U.S. 347 (1967) 7

Knowles v. *Iowa*,
525 U.S. 113 (1998) 2

Maryland v. *King*,
133 S. Ct. 1958 (2013) 3, 8

Missouri v. *McNeely*,
133 S. Ct. 1552 (2013) ..... *passim*

People v. *Esayian*,
112 Cal. App. 4th 1031
(Cal. Ct. App. 2003) 9

Preston v. *United States*,
376 U.S. 364 (1968) 3

Riley v. *California*,
134 S. Ct. 2473 (2014) ..... *passim*

Schmerber v. *California*,
384 U.S. 757 (1966) 3-5

United States v. *Robinson*,
414 U.S. 218 (1973) 1-4

REPLY BRIEF FOR PETITIONER

In its brief, Minnesota offers two arguments: that a test of deep-lung air to determine blood alcohol concentration qualifies as a search incident to arrest within the meaning of that exception to the warrant requirement; and that, even absent *any* recognized warrant exception, such tests are "reasonable," and therefore permissible, as a general matter. These contentions fail even to attempt to respond to the contrary showings made in our opening *Bernard* and *Birchfield* briefs. They should be rejected by the Court.

A. Minnesota cannot justify its warrantless chemical breath tests under the search-incident-to-arrest doctrine.

1. Robinson *does not state a special rule applicable to searches inside the body.*

In defending the decision below that breath tests may be justified under the search-incident-to-arrest exception to the warrant requirement, Minnesota advances a single contention: that, under *United States* v. *Robinson*, 414 U.S. 218 (1973), warrantless tests of the person are per se constitutional. This assertion—which is not supported by the United States or North Dakota—is a double misreading of *Robinson*.

First, *Robinson* in fact affirmed that the search-incident-to-arrest doctrine is "based upon the need to disarm [the arrestee] and to discover evidence." 414 U.S. at 235. Minnesota denies this, arguing that searches of the person require no rationale beyond the arrest itself. Minn. Br. 9; see Pet. App. 12a. But this Court has rejected calls to adopt just such a rule. See *Riley* v. *California*, 134 S. Ct. 2473, 2496 (2014) (Alito, J., concurring in part and concurring in the judgment). Rather, courts must examine whether a particular

"category" of warrantless search would "untether the rule from the justifications underlying" the search-incident-to-arrest exception. *Id.* at 2485. Adhering to this test, the Court repeatedly has declined to extend *Robinson* to certain categories of searches. See, *e.g.*, *ibid.* (digital data on cell phones); *Arizona* v. *Gant*, 556 U.S. 332, 343 (2009) (vehicle searches); *Knowles* v. *Iowa*, 525 U.S. 113, 118-119 (1998) (searches after issuing traffic citations).[1]

Second, Minnesota's argument misunderstands *Robinson*'s use of the phrase "the person." 414 U.S. at 235. *Robinson* itself dealt only with a pat-down of an arrestee's clothing and a search of the cigarette package found in his coat pocket. *Id.* at 222-23. It is this sort of exterior search—a search for "evidence found on an arrestee's body"—that *Robinson* contemplated when stating that searches of "the person" are reasonable incident to arrest. Pet. App. 24a-26a (Page & Stras, JJ., dissenting). And it is this understanding of the phrase "the person" that the Court has conveyed in all its search-incident-to-arrest decisions. See, *e.g.*, *Chimel* v. *California*, 395 U.S. 752, 763 (1969) (discussing the seizure of "evidence on the arrestee's person in

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[1] We do not contend, as Minnesota would have it, that "this Court effectively overruled *Robinson* in" *Gant* and *Riley*. Minn. Br. 10. The three decisions are all of a piece. *Robinson* requires that courts examine whether an entire *category* of search generally is supported by the purposes behind the search-incident-to-arrest exception, rather than conducting a case-by-case inquiry. *Robinson*, 414 U.S. at 235; see *Riley*, 134 S. Ct. at 2485. Thus, when this Court described the *Robinson* rule as applying "categorically," it did so to contrast *Robinson* with the "case-specific" reasonableness inquiry required by the exigent circumstances exception. *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1559 n.3 (2013). *Gant* and *Riley* confirmed this rule, and determined that certain categories of search are impermissible.

order to prevent its concealment or destruction"); *Preston* v. *United States*, 376 U.S. 364, 367 (1968) (stating that searches incident to arrest are justified "where the weapon or evidence is on the accused's person").[2]

The rule in *Robinson* does not apply, on the other hand, to chemical alcohol tests *inside* the body, which "implicate[] an individual's 'most personal and deep-rooted expectations of privacy.'" *McNeely*, 133 S. Ct. at 1558 (citation omitted). Both *Schmerber* v. *California*, 384 U.S. 757, 769-770 (1966), and *McNeely* confirm as much. See *Bernard* Opening Br. 18-20. *Robinson* does not authorize roving expeditions into a person's body.

Minnesota's entire response to these precedents is that *Schmerber* and *McNeely* "involved blood tests, not breath tests." Minn. Br. 12. Minnesota thus makes no attempt to reconcile these decisions with its reading of *Robinson*. And for good reason: it cannot. *Schmerber* squarely held that "the mere fact of a lawful arrest" does not justify warrantless searches "beyond the body's surface," because the "interests in human dignity and privacy which the Fourth Amendment protects" outweigh the government interests underlying the search-incident-to-arrest exception. 384 U.S. at 769-770. Under *Schmerber*, intrusions into the body cannot be justified as searches incident to arrest.

If *Robinson* had truly announced a "categorical right to search persons incident to lawful arrests"

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[2] The Court did use the phrase "the person" in a general discussion involving buccal swabs. *Maryland* v. *King*, 133 S. Ct. 1958, 1970-1971 (2013). This discussion, however, came only after the Court determined that the searches at issue fell within the special needs exception to the warrant requirement, and that a warrant therefore was not required. *Id.* at 1969-1970.

(Minn. Br. 10)—and if that right extended to the interior of the body, as the court below held and as Minnesota maintains (Pet. App. 8a-9a, 13a; Minn. Br. 9-11)—*Robinson* would have read *Schmerber* off the books. Yet the Court in *Robinson* did not disapprove *Schmerber*'s search-incident-to-arrest holding, and the Court confirmed that holding in *McNeely*. 133 S. Ct. at 1558. This is because *Robinson* did not apply to searches "beyond the body's surface." *Schmerber*, 384 U.S. at 769. It authorized only certain searches outside of the body, and physical searches of objects found there.[3] Breathalyzer tests, which require insertion of a tube into the arrestee's mouth to retrieve deep-lung air (*Bernard* Opening Br. 24-25), lie beyond *Robinson*'s reach.

2. Chemical BAC tests do not implicate the Chimel *rationales.*

Minnesota also maintains that warrantless breath tests are constitutional because they "further the *Chimel* justification in preventing the destruction of evidence." Minn. Br. 11. As with Minnesota's view of *Robinson*, this argument is doubly wrong.

First, concerns about alcohol dissipation would apply equally to all chemical alcohol tests, including

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[3] *Robinson* does not apply even to all exterior searches of the body. For instance, the Court has said that "the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street" (*Illinois* v. *Lafayette*, 462 U.S. 640, 645 (1983)), and has declined to decide whether a strip search can be justified under the search-incident-to-arrest exception (*id.* at 646 n.2; see *Florence* v. *Bd. of Chosen Freeholders of Cty. of Burlington*, 132 S. Ct. 1510, 1522-1523 (2012)). If Minnesota's characterization of *Robinson* were correct, both a forced disrobing and a strip search would be per se justified as part of a "full search of [the] person." Minn. Br. 9.

blood tests. Yet *Schmerber* determined that blood tests could not be justified solely on the basis of an arrest, as fears about destruction of evidence "have little applicability with respect to searches involving intrusions beyond the body's surface." 384 U.S. at 769. *Schmerber* thus forecloses any reliance on the destruction-of-evidence rationale.

Second, even if *Schmerber* did not decide this issue, *McNeely* did. Minnesota states that "the alcohol level in a person's blood begins to dissipate" at a steady rate after it is absorbed into the body, such that "a significant delay in testing will negatively affect the probative value of the results." Minn. Br. 11-12 (quoting *McNeely*, 133 S. Ct. at 1560-1561). This is true, as far as it goes. But focusing on this pronouncement in *McNeely*, and not on what comes afterward, wholly misses the Court's point. In fact, the Court explicitly differentiated blood alcohol evidence from evidence over which arrestees have direct control:

> In contrast to, for example, circumstances in which the suspect has control over easily disposable evidence, * * * BAC evidence from a drunk-driving suspect naturally dissipates over time in a gradual and relatively predictable manner. Moreover, because a police officer must typically transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test, some delay between the time of the arrest or accident and the time of the test is inevitable regardless of whether police officers are required to obtain a warrant. * * * This reality undermines the force of the State's contention * * * that we should recognize a categorical excep-

> tion to the warrant requirement because BAC evidence "is actively being destroyed with every minute that passes."

McNeely, 133 S. Ct. at 1561 (citations omitted). Because there is nothing that arrestees can do to destroy BAC evidence—and because not even Minnesota argues that blood alcohol tests are needed to protect officer safety—the traditional *Chimel* rationales cannot justify chemical alcohol tests. See *Bernard* Opening Br. 20-21.

B. Warrantless breath tests may not be upheld on a theory of "general reasonableness."

Alternatively, Minnesota asserts that warrantless tests of deep-lung air—and, therefore, the State's compelled-search regime—may be approved on the theory that they are "reasonable" as a general matter. Minnesota Br. 13-24. For reasons addressed in our opening *Bernard* brief, this contention is insupportable.

As we showed there, Minnesota's invocation of a general-reasonableness standard cannot be reconciled with the central rationale underlying the warrant requirement. It is settled that warrantless searches in criminal cases are *presumptively* unreasonable and unconstitutional. See *Bernard* Opening Br. 12-13; *Riley*, 134 S. Ct. at 2482 (The Court's decisions consistently "have determined that '[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, * * * *reasonableness generally requires the obtaining of a judicial warrant.*'" (emphasis added)). The Court has made clear time and again that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amend-

ment." *Arizona* v. *Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz* v. *United States*, 389 U.S. 347, 357 (1967)). This fundamental rule is "subject only to a few specifically established and well-delineated exceptions" (*ibid.*)—none of which Minnesota is able to invoke here. It therefore is unsurprising that the particular rationales advanced by Minnesota in support of its reasonableness argument are unavailing.

1. Minnesota begins by reciting the significant state interest in combating impaired driving. Minnesota Br. 14-16. But as we showed in our opening *Birchfield* brief (at 18-19), the Court rejected precisely this justification for a "general reasonableness" exception to the warrant requirement in *McNeely*. In fact, the government interest invoked by Minnesota here is no different in character from that posed by *any* serious criminal offense. Yet no one would suggest that the significant public interest in responding to, for example, life-threatening narcotics offenses or those touching on national security justifies dispensing with the warrant requirement in those cases.

The State also notes that BAC tests will be administered only when there is probable cause to believe that the subject has been driving while impaired. Minn. Br. 19. But that argument, too, was expressly rejected in *McNeely* as a reason for dispensing with the warrant requirement. See *Birchfield* Opening Br. 19. Indeed, if the existence of probable cause to arrest were sufficient to overcome the expectation of privacy that supports the warrant requirement, there would have been no need to recognize the search-incident-to-arrest exception to the requirement in the first place; *all* searches would be permissible following arrest. That, of course, is not the law.

2. In addition, Minnesota—on this point, supported by the United States—contends that breath tests, unlike blood tests, categorically may be conducted without a warrant. But the arguments advanced in support of this argument are insubstantial.

First, the United States points, "[o]n the public side," to the interest in "quickly and accurately identifying drunk drivers," as well as to the fact that conducting a breath test on the spot might make unnecessary a more intrusive arrest. U.S. Br. 33-34; see Minn. Br. 22. But that is hardly a reason to dispense with the warrant requirement: precisely the same points could be made in most cases where a suspect is arrested on suspicion of having just committed a crime and might, for example, be in possession of contraband. Moreover, "[t]he fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. Not every search 'is acceptable solely because a person is in custody.'" *Riley*, 134 S. Ct. at 2488.

Indeed, the Court has often differentiated between the diminished privacy interests that exist after booking or charging a suspect, and the greater privacy rights of "an arrestee whose detention has not yet been reviewed by a magistrate or other judicial officer." *Florence*, 132 S. Ct. at 1523; *King*, 133 S. Ct. at 1971; *Bell* v. *Wolfish*, 441 U.S. 520, 544-548 (1979). Until a neutral magistrate has evaluated either the probable cause to arrest or the validity of an arrestee's detention, the constitutional justifications that allow at least some warrantless invasive searches do not apply. Petitioner never had this opportunity for review before police officers demanded to conduct a breath test. Pet. App. 3a-4a.

Second, the United States points to what it describes as the minimal intrusion of a breath test that is directed at obtaining deep-lung air. U.S. Br. 34; see Minn. Br. 19-21. Yet neither the United States nor Minnesota is able to point to a single decision in which the Court has authorized a warrantless search *inside* the body as part of a routine criminal investigation where a showing of probable cause was required. "The reason is that no such case exists." Pet. App. 28a (Page & Stras, JJ., dissenting). Breath tests require the insertion of a mouthpiece into the arrestee's mouth, after which the arrestee must blow into the mouthpiece him- or herself. Minn. Br. 20. The breath test lasts "anywhere from four to fifteen seconds" (*ibid.*)—around the same amount of time as a blood draw (see, *e.g.*, *People* v. *Esayian*, 112 Cal. App. 4th 1031, 1035 (Cal. Ct. App. 2003)). It strains both credulity and the English language to suggest, as does the United States, that such a breath test, although qualifying as a Fourth Amendment "search," poses only de minimis privacy concerns "and [is] not invasive of the body." U.S. Br. 34.

Third, the remaining contentions offered by the United States and Minnesota are makeweights. The United States observes that "[a]ll 50 States provide for warrantless breath tests under their implied-consent provisions." U.S. Br. 35. But this statement presumably is a reference to laws that suspend licenses as a penalty for test refusal, which are hardly equivalent to a "warrantless breath test" demanded in the course of a criminal investigation. These provisions also apply

equally to blood and urine tests, which all agree ordinarily *are* subject to a warrant requirement.[4]

The United States also contends that a warrant in the breath-test context "would fail to serve an important traditional function of warrants" because, even if a warrant is obtained, a breath test cannot be performed on a nonconsenting individual. U.S. Br. 35. But in fact, as we show in the *Birchfield* reply (at 17-19), warrants often induce suspects to cooperate with a search. And in any event, the speculative possibility that the recipient might not respond to a warrant is hardly a reason to allow officers in the field to ignore the warrant requirement altogether.

Finally, Minnesota does not advance its position by asserting that a warrant is unnecessary because a neutral magistrate ultimately will make a probable cause determination prior to the imposition of a criminal penalty. Minn. Br. 23. The point of the warrant requirement is to assure that the "inferences to support a search" are drawn by a neutral magistrate. *Riley*, 134 S. Ct. at 2482. It would seem obvious that this purpose will be frustrated if the magistrate is not consulted until *after* the search takes place.

Of course, warrantless chemical alcohol tests may be constitutional in some circumstances. If a true "now or never situation" is present, officers may justify a

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[4] We noted in the opening *Bernard* brief (at 25-26) that the generally equivalent treatment of nonconsensual blood and breath tests by the States suggests that the privacy interests at stake in the two sorts of test are equivalent. The United States responds that forcible testing is not at issue here. But that is a non sequitur; our point is that States have placed significant and equivalent restrictions on the two forms of test, which indicates that the States have recognized both to "implicate a significant privacy interest." *McNeely*, 133 S. Ct. at 1567.

breath or blood test under the exigent circumstances exception to the warrant requirement. *McNeely*, 133 S. Ct. at 1563; see *Riley*, 134 S. Ct. at 2487. But the blunderbuss rejection of the warrant requirement proposed by the United States and Minnesota cannot be reconciled with either the policy of the Fourth Amendment or this Court's precedents: "[w]hether a warrantless [chemical] test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *McNeely*, 133 S. Ct. at 1563.

CONCLUSION

The decision of the Minnesota Supreme Court should be reversed.

Respectfully submitted.

JEFFREY S. SHERIDAN
Sheridan & Dulas, P.A.
320 Eagandale Center
1380 Corporate Center Curve
Eagan, MN 55121
(651) 686-8800

EUGENE R. FIDELL
Yale Law School
*Supreme Court Clinic**
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

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* The representation of petitioner by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

No. 14-1470

In the Supreme Court of the United States

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Minnesota

SUPPLEMENTAL BRIEF FOR PETITIONER

JEFFREY S. SHERIDAN
Sheridan & Dulas, P.A.
320 Eagandale Center
1380 Corporate Center Curve
Eagan, MN 55121
(651) 686-7870

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to this Court's Rule 15.8, petitioner submits this supplemental brief to call the Court's attention to the recent decision of the Hawaii Supreme Court in *State of Hawai'i* v. *Yong Shik Won*, No. SCWC-12-0000858, 2015 WL 7574360 (Haw. Nov. 25, 2015), authority that was not available at the time of petitioner's last filing.

The petition for a writ of certiorari in this case, and the related petition in *Birchfield* v. *North Dakota*, No. 14-1468, present the question whether a person who is arrested on suspicion of driving while impaired may be required to submit to a warrantless chemical test of his or her breath, blood, or urine, and may be subjected to serious criminal penalties for refusing to take the test. In this case, the Minnesota Supreme Court held that such compelled tests of deep-lung air are permissible under the search-incident-to-arrest doctrine; in *Birchfield*, the North Dakota Supreme Court held that a defendant may be criminally punished for refusal to submit to a blood test performed in these circumstances on the theory that compelled consent is both reasonable and a valid condition on the grant of a driver's license.

In *Yong Shik Won*, however, the Supreme Court of Hawaii rejected all of these rationales. The Hawaii court there overturned the driving-while-impaired conviction of a person who was compelled to consent to a breath test by the threat of criminal penalties under a Hawaii test-refusal statute that is materially identical to the similar test-refusal laws of North Dakota and Minnesota.

Applying "[t]he right to be free of warrantless searches and seizures [that] is a fundamental guar-

antee of our constitution" (*Yong Shik Won*, 2015 WL 7574360, at *6) absent "'specifically established and well-delineated exceptions'" to the warrant requirement (*ibid.* (citation omitted)), the Hawaii court noted that a valid consent to a search must be the product of a "'free and unconstrained choice'" (*id.* at 22 (quoting *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225-26 (1973) and that "'[a] suspect may of course delimit as he chooses the scope of the search to which he consents.'" *Ibid.* (quoting *Florida* v. *Jimeno*, 500 U.S. 248, 252 (1991)). The Hawaii court added that, "[w]here arrest, conviction, and imprisonment are threatened if consent to search is not given, the threat infringes upon and oppresses the unfettered will and free choice of the person to whom it is made, whether by calculation or effect." *Id.* at *14.

Against this background, where the defendant "had no other alternative to avoid prosecution for the refusal offense but to submit to the search," the Hawaii court found that consent to the search is "invalid as a waiver of [the defendant's] right not to be searched." *Yong Shik Won*, 2015 WL 7574360, at *16. The court added that a "balancing approach to determine reasonableness" is invalid absent a warrant or the presence of a recognized exception to the warrant requirement (*ibid*); that consent to search could not be required as a "condition of the privilege of driving on public roads" (*ibid.*); and that "[t]he search incident to arrest exception [to the warrant requirement] is also inapplicable as it is 'limited in scope to a search of the arrestee's person and the area within his immediate control from which he could obtain a weapon or destroy evidence.'" *Id.* at *6 n.23 (citation omitted). The Hawaii Supreme Court thus rejected each of the theories endorsed by the North

Dakota and Minnesota Supreme Courts in this case and in *Birchfield*.

In reaching its conclusion, the Hawaii Supreme Court purported to apply the search and seizure provision of the Hawaii Constitution, Haw. Const. Art. I, § 7. But that does not diminish the significance of the disagreement between the courts on the issue presented here. In relevant respects, this provision of the Hawaii Constitution and the Fourth Amendment of the U.S. Constitution have substantially similar language and an identical meaning. Thus, the Hawaii Supreme Court in *Yong Shik Won* repeatedly cited and relied upon Fourth Amendment decisions of this Court and of federal courts of appeals. See *Yong Shik Won*, 2015 WL 7574360, at *5-6 & n.23, *7, *11, *13 & n.29, *14 & n.33, *17, n.39, *18, *19, *20. And the concurring Hawaii Justice expressly recognized that the Hawaii compelled-consent statute "constitutes an unconstitutional abridgement of the right to be free from unreasonable searches and seizures" under both the Hawaii Constitution "*and* the fourth amendment to the United States Constitution." 2015 WL 7574360, at *33 (Wilson, J., concurring) (emphasis added); see *id.* at *34 (criticizing decision of the North Dakota Supreme Court in *Birchfield*); *id.* at *36 (citing decisions of this Court); *id.* at *38 (search in *Yong Shik Won* violates "the warrant requirement of the fourth amendment of the United States Constitution").

Accordingly, because the decision of the Hawaii Supreme Court in *Yong Shik Won* confirms that there is considerable uncertainty in the lower courts on the question presented here, and because that question is an important and recurring one, the peti-

tions for writs of certiorari in this case and in *Birchfield* should be granted.

Respectfully submitted.

JEFFREY S. SHERIDAN
Sheridan & Dulas, P.A.
320 Eagandale Center
1380 Corporate Center Curve
Eagan, MN 55121
(651) 686-7870

EUGENE R. FIDELL
Yale Law School
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PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

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